In the Supreme Court of the United States

October Term, 1975
No. 75-554

FRANK S. BEAL, Individually and as Secretary of the Department of Public Welfare, Commonwealth of Pennsylvania; ROGER CUTT, Individually and as Assistant Deputy Secretary for Medical Services, Commonwealth of Pennsylvania; GLENN JOHNSON, Individually and as Chief of the Bureau of Medical Assistance, Commonwealth of Pennsylvania; EDWARD KALBERER, Individually and as Executive Director of the Allegheny County Board of Assistance; and THE DEPARTMENT OF PUBLIC WELFARE, OF THE COMMONWEALTH OF PENNSYLVANIA,

Petitioners

v.

ANN DOE; BETTY DOE, a Minor, by Her Mother as Representative, Mother B. Doe; CATHY DOE; DONNA DOE, a Minor, by Her Mother as Representative, Mother D. Doe; ELAINE DOE; JANE DOE, a Minor, by Her Father as Representative, Father J. Doe; NANCY DOE; PATRICIA DOE; RUTH DOE; SYLVIA DOE; and TONI DOE, Each Individually and on Behalf of All Other Women Similarly Situated,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

NORMAN J. WATKINS
Deputy Attorney General
LAWRENCE SILVER
Deputy Attorney General
Chief, Civil Litigation
ROBERT P. KANE
Attorney General
Attorneys for Petitioners

Deparment of Justice
Capitol Annex
Harrisburg, Pa. 17120

Murrelle Printing Co., Law Printers, Box 100, Sayre, Pa. 18840

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES:

STATUTES:

UNITED STATES CONSTITUTION:

OTHER AUTHORITY:

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No. 75-

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Petitioners

v.

ANN DOE, et al.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Frank S. Beal, Secretary of the Department of Public Welfare, Commonwealth of Pennsylvania, *et al.*, hereby petition that a Writ of Certiorari issue to review the judgment of the United State Court of Appeals for the Third Circuit entered in this case on July 21, 1975.

I. OPINIONS BELOW

The opinion of the District Court is reported at 376 F. Supp. 173, and is printed in the Appendix, pp. 1a-51a. The initial opinion of the Court of Appeals dated Decem-

ber 10, 1974, is not officially reported and is printed in the Appendix, pp. 52a-59a. The majority and dissenting opinions of the Court of Appeals *en Banc* dated July 21, 1975 are not yet officially reported and are printed in the Appendix, pp. 60a-88a, and pp. 89a-120a respectively.

II. JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on July 21, 1975. App. pp. 86a-88a. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

III. QUESTION PRESENTED

This petition raises the question of whether the Commonwealth of Pennsylvania is required under the terms of Subchapter XIX of the Social Security Act, 42 U.S.C. §1396 *et seq.*, hereinafter referred to as Title XIX, to provide Medicaid funds for the costs of non-therapeutic abortions. The Court of Appeals for the Third Circuit *en Banc* decided that such a requirement is inferentially within Title XIX, two Circuit Court holdings to the contrary notwithstanding. Therefore, the following question is presented:

Whether Title XIX of the Social Security Act, 42 U.S.C. §1396 *et seq.* requires that states which participate in the federal-state Medicaid Program, such as the Commonwealth of Pennsylvania provide Medicaid funds for the costs of non-therapeutic abortions?

STATEMENT OF THE CASE

The Commonwealth of Pennsylvania is a participant in the federal-state medical assistance program established under Title XIX of the Social Security Act, 42 U.S.C. §1396 *et seq.* As such the Commonwealth through its Department of Public Welfare has formulated a State Medicaid Plan which generally establishes the criteria under which eligibility for state and, in varying amounts, federal subsidization of the costs of medical services is determined. In short the federal law has established only the broad parameters of the Medicaid Program . . . which provides for payment of "the costs of necessary medical services. . ."[1] Accordingly the Commonwealth of Pennsylvania has established, by its state plan, the level of need requisite to receiving benefits under the program.

As an integral part of this program the Pennsylvania Medicaid Program provides for reimbursement of the reasonable costs of abortions. The only requirements that an eligible participant must meet in order to have the reasonable costs of the abortion reimbursed from Medicaid funds are that the abortion must be medically necessary to protect the health of the mother, and that it be performed in accord with established medical procedures. These requirements are, of course, not unique to the abortion procedure but in fact such requirements exist for all medical services under the Pennsylvania Medicaid Plan. Finally it should be noted that Pennsylvania's Medicaid Plan has been approved by the Secretary of Health, Education and Welfare.

[1] 42 U.S.C. §1396a.

The plaintiffs in this action were pregnant women who were then financially eligible for medical assistance in Pennsylvania. All of the plaintiffs desired abortions that were, by their own admission, not medically necessary, but rather these plaintiffs desired their abortions for reasons of general convenience. In order to compel the defendant Department of Public Welfare of the Commonwealth of Pennsylvania to pay the costs of these abortions the plaintiffs instituted this action on October 3, 1973. The plaintiffs generally asserted by way of their civil rights action that Pennsylvania's medical assistance regulations regarding abortions were, in the first instance, invalid as being inconsistent with the Social Security Act, and alternatively that they violated the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

On May 3, 1974 by majority opinion of the Federal District Court for the Western District of Pennsylvania held that these Medicaid regulations, while being consistent with the Social Security Act, violated the Fourteenth Amendment as applied in the first trimester of pregnancy (App. 1a-40a). Both sides then appealed this decision to the Court of Appeals for the Third Circuit.[2] After argument before a panel of three circuit judges, on December 10, 1974 the District Court was sustained for reasons not related to the merits of the case (App. 53a-59a). Both sides then petitioned for, and were granted,

[2] Plaintiffs chose to appeal only from the denial of declaratory relief in the second trimester of pregnancy, and not the Court's refusal to grant any permanent injunctive relief. And, of course, the defendants could only appeal the adverse declaratory judgment, thus jurisdiction over the appeal was properly in the Circuit Court, ***Mitchell v. Donovan***, 398 U.S. 427 (1970).

rehearing before the Court of Appeals *en Banc* and this opinion by the Court of Appeals was vacated.[3]

Reargument before the Court of Appeals *en Banc* was held on May 8, 1975. As will be discussed more fully later, the Court of Appeals disagreed with the District Court and held that Pennsylvania's Medicaid abortion regulations were invalid as being inconsistent with Title XIX of the Social Security Act. Having thus held, the Court of Appeals properly did not address the constitutional challenge raised by the plaintiffs, hereinafter referred to as respondents. It is from this decision that the defendants, hereinafter referred to as petitioners, seek a writ of certiorari. And it is of this opinion that petitioners seek review in this Court.

[3] While no mention of defendants' petition for rehearing is found in the Appeals Court's final opinion such a petition was filed with the Court by defendants on December 24, 1974.

REASONS FOR GRANTING THE WRIT

A. The Opinion of the Court Below Is in Direct Conflict With Opinions Rendered by Other Circuit Courts Regarding the Validity of Similar Regulations Under Title XIX of the Social Security Act

Consistent with what was done in various other states,[4] and in accord with local recognized medical standards, the Commonwealth of Pennsylvania, through its Department of Public Welfare adopted certain standards of eligibility for reimbursement of the medical costs of abortions. These standards, often referred to as "medical necessity" standards, provide that abortions will be subsidized under the medical assistance program only in the following situations:

> 1. There is documented medical evidence that continuance of the pregnancy may threaten the health of the mother;
>
> 2. There is documented medical evidence that an infant may be born with incapacitating physical deformity or mental deficiency; or
>
> 3. There is documented medical evidence that continuance of a pregnancy resulting from legally established statutory or forcible rape or incest, may constitute a threat to the mental or physical health of a patient; and

[4] See *Roe v. Ferguson*, 515 F. 2d 279 (6th Cir. 1975); *Doe v. Rose*, 499 F. 2d 1112 (10th Cir. 1974); and *Roe v. Norton*, F. 2d , Docket No. 74-1874 (2nd Cir. July 31, 1975).

4. Two other physicians chosen because of their recognized professional competency have examined the patient and have concurred in writing; and

5. The procedure is performed in a hospital accredited by the Joint Commission on Accreditation of Hospitals. (See n. 1 at App. 2a.)

The respondents brought this action under 28 U.S.C. §1343(3) and (4) and rested their claims on the Civil Rights Act, 42 U.S.C. §1983. By this action the respondents attacked Pennsylvania's Medicaid standards for abortions on two general fronts. First they asserted that these standards were inconsistent with requirements of Title XIX of the Social Security Act. Secondly, the respondents contended that these abortion standards violated the Equal Protection Clause of the Fourteenth Amendment.

As to the respondents' first contention the District Court held, and petitioners suggest quite correctly, that Pennsylvania's standards were not inconsistent with Title XIX of the Social Security Act (App. 18a-26a). The trial court accepted, at least *arguendo,* respondents' arguments in this regard by noting that while under certain sections of the act ". . . abortion payments are clearly *authorized*"[5] but the court noted, this was not the end of the inquiry. The pivotal question is not whether or not Pennsylvania is authorized to make such payments but rather "[w]hether or not Pennsylvania may, by means of its Regulations and/or Procedures, determine when the performance of an abortion becomes a medical necessity?" (App. 23a) In other words, is Pennsylvania *required* to establish, as part of its medical assistance program, a level

[5] App. 22a. (Emphasis added.)

of medical necessity that would include payments for non-therapeutic abortions?

For its answer the District Court relied on various holdings of this Court including *inter alia, Jefferson v. Hackney,* 406 U.S. 535 (1972), and *Dandridge v. Williams,* 397 U.S. 471 (1970), for the settled proposition that the states have been given great latitude in establishing standards for the administration of their assistance programs under Title XIX. The District Court noted also that Congress was silent as to the specific authorization, not to mention *requirement,* of payment under Medicaid for non-therapeutic abortions. Accordingly, the trial court held that:

> ". . . Pennsylvania standards must be scrutinized without curtailment by Congressional action and the State Regulations and/or Procedures must be given great latitude in providing for the administration of the Program. We, therefore, feel compelled to find Pennsylvania's Regulations do not conflict with Title XIX of the Social Security Act." (App. 26a)[6]

Both sides took appeals from this decision to the Court of Appeals for the Third Circuit. The Court of Appeals *en Banc* rejected the reasoning of the District Court and held that petitioners' abortion standards violated the *implied* requirements of Title XIX.[7] In so holding the

[6] As noted earlier, the District Court with Circuit Judge Weis dissenting, did go on to hold that Pennsylvania's standards regarding Medicaid payments for abortions were unconstitutional as to the first trimester of pregnancy only, and thus were in violation of the Equal Protection Clause of the Fourteenth Amendment.

[7] Circuit Judges Kalodner, Gibbons, and Adams dissented, see App. 89a-120a.

Court clearly recognized that its decision was in direct conflict with two other Circuit Court opinions as follows:

> "In reaching the above conclusion, we are not unmindful that other courts have found state provisions like Pennsylvania's to be consistent with the Statutory scheme. In *Roe v. Ferguson,* 43 U.S.L.W. 2452 (6th Cir. No. 74-2195, Apr. 28, 1975), the Sixth Circuit reversed a district court's holding that Title XIX requires state funding for elective abortions. The court wrote:
>
> 'There is no indication that Congress intended to require the furnishing of abortion services not required for the preservation of the health of the woman at a time when the performance of such abortions was illegal in most jurisdictions. In view of the disfavor shown toward abortions in other legislation, we are reluctant to infer that Congress intended to include required coverage for such controversial services without even mentioning the subject. When Congress passed the Family Planning Services and Research Act of 1970, 42 U.S.C. §§300a et seq., providing funds to states opting to participate in creating comprehensive programs of family planning services, abortion was specifically excluded as a means of family planning to be recognized under the Act. 42 U.S.C. §300a-6.
>
> 'In establishing the Legal Services Corporation system, Congress again provided that no funds of the Corporation could be used for legal assistance for those seeking to procure a non-therapeutic abortion. 42 U.S.C. §2996f(b)(8).' [Cite omitted.]

> "See also *Doe v. Rose, supra* at 1114-15 ('prefer(ring)' to decide the case on constitutional grounds in light of the Act's silence on the abortion question); *Doe v. Wohlgemuth, supra.* We find none of these arguments to be persuasive. . . ." (App. 84a-85a)

The Court of Appeals was certainly correct that its opinion was in direct conflict with holdings of the Courts of Appeals in *Roe v. Ferguson*[8] *and Doe v. Rose.*[9] *In* both of these cases we find factual situations and legal contentions that are indistinguishable from those that are present in this case. In both cases pregnant women, *inter alia,* otherwise eligible in their respective states for medical assistance, sought state reimbursement for non-therapeutic abortions. In *Ferguson,* Ohio law prohibited the use of state or local funds to pay for any abortions unless the abortion was necessary to preserve the physical or mental health of the pregnant woman, *Ferguson, supra* at 279-80. And similarly in *Rose,* the Director of the Utah State Department of Social Services established a policy which prohibited the expenditure of Medicaid funds for non-therapeutic abortions. And, as the Court of Appeals in this case noted, both of those cases resulted in findings by the respective Circuit Courts that such regulations do not contravene the mandate of Congress as expressed in Title XIX.

Further, the Circuit Court in this case placed strong reliance for judicial authority for its opinion on the case of *Roe v. Norton,* 380 F. Supp. 726 (D. Conn. 1974). Again, the *Norton* case is indistinguishable from the case *sub judice.* In *Norton* a regulation of Connecticut's Welfare Department that extended Medicaid coverage to only

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[8] *Roe v. Ferguson,* 515 F.2d 279 (6th Cir. 1975).

[9] *Doe v. Rose,* 499 F.2d 1112 (10th Cir. 1974).

therapeutic abortions was challenged as being violative of Title XIX of the Social Security Act and, in the alternative, as violating *inter alia* the Equal Protection Clause of the Fourteenth Amendment. While the District Court in that case did hold that those regulations violated the terms of the Social Security Act, the Court of Appeals' reliance on this holding was misplaced.

Ten days after the opinion in this case was handed down the Second Circuit Court of Appeals reversed the District Court in *Norton*.[10] Indeed the Second Circuit held correctly, and in direct conflict with the opinion in this case, as follows:

> "We disagree with the court below insofar as it held that Title XIX prohibits state regulations such as Section 275 which deny Medicaid coverage for elective abortions. In our view, while Title XIX *permits* federal reimbursement for elective abortions, it does not *forbid* state regulations limiting Medicaid payments for abortions to those which are therapeutically necessary for the health of the pregnant woman. This construction of the statute is in accord with the view expressed by H.E.W. on this appeal. [Note omitted.]
>
> "When Congress enacted Title XIX in 1965, abortions which were not therapeutically necessary either for the life or health of the pregnant woman, were unlawful in most states. As late as 1973, 31

[10] *Roe v. Norton*, F.2d (Docket No. 74-1874, 2nd Cir. July 31, 1975). See n. 6 at 5304 of that opinion where it is apparent that the *Norton* Court was not aware of the decision in this case. Notwithstanding this it is clear that that Court discussed and rejected most, if not all, of the arguments which form the basis for Appeals Court's decision in this case.

states had statutes on the books forbidding the performance of elective abortions. *Roe v. Wade, supra,* 410 U.S. 118, n. 2. It was not until some eight years after the passage of Title XIX that *Roe v. Wade, supra,* and *Doe v. Bolton, supra,* held that such state legislation, at least in the first trimester of pregnancy, was unconstitutional. During those eight years the abortion question in its various aspects was highly controversial.

"The court below did not point to any provision of Title XIX which prohibits state regulations denying Medicaid coverage for elective abortions. There is certainly no mention of abortion or abortion services in Title XIX. A thorough combing of the statute does not lead us to any language which directly or inferentially can be construed as prohibiting state regulations such as Section 275.

"Moreover, no intention to prohibit state regulations of that nature can be ascribed to Congress. There is no legislative history to support the view that by enacting Title XIX Congress intended to prohibit states from denying Medicaid coverage for elective abortions.

"A statute must be construed with reference to the circumstances existing at the time of its passage and in the light of the conditions under which Congress acted at the time. *Moor v. County of Alameda,* 411 U.S. 693, 709 (1973); *United States v. Wise,* 370 U.S. 405, 411 (1962); *United States v. Rothberg,* 480 F.2d 534, 535 (2d Cir. 1973); *cert. denied,* 414 U.S. 856 (1973); *Ries v. Lynskey,* 452 F.2d 172, 175 (7th Cir. 1971). *Cf. Department of Social Services v. Dublino,* 413 U.S. 405 (1973); *Hamar*

Theatres, Inc. v. Cryan, 365 F. Supp. 1312 (D. N.J. 1973) (three-judge court), vacated and remanded for consideration of mootness, 419 U.S. 1085 (1974). In the light of the circumstances and conditions at the time the statute was enacted, the absence of any language in the statute regarding the subject, and the lack of legislative history indicating a contrary position, it cannot be supposed that Congress, in 1965 intended to or did impose a requirement that states must provide coverage for elective abortions when the criminal statutes of the majority of the states forbade the performance of such abortions." *Roe v. Norton,* supra at 5305-7.

In view of the foregoing discussion and authorities it is manifest that there presently exists a direct conflict among various circuit courts over the same question of federal law, specifically whether or not Title XIX of the Social Security Act mandates that the states pay the costs of abortions sought for reasons of convenience *vis-a-vis* reasons of health. It would be inappropriate at this point to elaborate with any more specificity the reasons why petitioners contend that the decision below is in error at this time.[11] However, in concluding this section of the petition it is strongly urged that your petitioners presently stand aggrieved by the decision of the court below, and consequently by the conflict of federal law that has thus been created.

[11] R. Stern & E. Gressman, *Supreme Court Practice*, 207, §641 (4th ed. 1969).

B. The Question Presented in This Case Is a Matter of Great Public Concern

The conflict of the circuits that has been set forth in the preceding section of this petition arises out of a controversy that is presently of great public concern, and, as such, involves an important question of federal statutory construction. As has already been pointed out, this controversy has been specifically addressed by four circuit courts and numerous district courts.[12] And it goes without saying that the lives of thousands, if not millions, of persons will necessarily be affected by the outcome of this lawsuit.

It is clear from the majority and dissenting opinions below that the issue raised by this suit involves a substantial question of statutory construction. Further, review of this decision by this court will necessarily resolve a presently existing conflict between those charged with the administration of the Social Security Act and the lower court in this case. See *Rothensies v. Electric Battery Co.*, 329 U.S. 296, 299 (1956); *F.T.C. v. Jantzen, Inc.*, 386 U.S. 228, 229 (1966). The dissenting opinion below very clearly points out the majority's disagreement with the position formally taken by responsible federal officials on the question of whether Title XIX requires Medicaid payments for non-therapeutic abortions, as follows:

> "Coming now to the majority's disregard of the views expressed by the Solicitor General of the United States, and the federal agency which administers the

[12] See n. 4, supra.

Medicaid program, on the score of the reach of Title XIX, in its holding that 'the Pennsylvania Regulations are inconsistent with Title XIX':

> "As already stated, the Solicitor General in his Amicus Curiae Memorandum [note omitted] specifically opined that 'the Social Security Act does not require a federally funded state medicaid program to pay for abortions that are not medically indicated', and, the federal agency which administers the Medicaid program, in a statement on its 'position' on abortion, [note omitted] made it clear that a Medicaid state has the option of funding abortions, and if it does, 'the federal Government shares with the State.'" App. 102a-103a.

Thus the conflict has gone beyond the confines of the judicial branch. It is submitted that unless and until this very important question of federal law is resolved by this Court a state of confusion on this issue will exist in the judicial and executive branches of the Federal Government, as well as in many other states with similar Medicaid regulations. *McGee v. International Life Insurance Co.*, 355 U.S. 220 (1957). Furthermore, there is presently pending no case on this Court's docket, of which petitioners' counsel is aware, wherein this issue will be resolved.[13]

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[13] This Court has by order dated June 23, 1975 granted certiorari in the case of *Singleton v. Wulff*, No. 74-1393 which case arose from similar factual and legal bases as the case *sub judice*. However, presumably because of the rather unusual procedural history of the *Singleton* case this Court has expressly limited its review to: (1) the standing of the respondent-physicians; and (2) whether the Court of Appeals exceeded its jurisdiction by proceeding to decide the constitutionality of similar abortion regulations before the District Court had dealt with the issue.

C. Resolution of the Conflict Among the Circuit Courts Will Necessarily Result From Judicial Review of This Case

As set forth at the outset of this petition the respondents have challenged Pennsylvania's Medicaid standards regarding abortion on two separate levels, statutory and constitutional. And while the petitioners at the trial level did raise a question as to the respondents' standing, this issue was intentionally forsaken on appeal. Thus the only issues before the Court of Appeals were (1) whether or not Title XIX required Medicaid payment for non-therapeutic abortions; and, if not, (2) whether the Equal Protection Clause required such payment. Having held in favor of respondents on the first claim, of course the Court of Appeals properly never dealt with the constitutional question. Thus, as the record presently stands there are no other issues in the case which, if decided one way or the other by this Court, could dispose of the controversy without resolving the obvious conflict among the circuit courts. This is but another way of stating that the issue out of which the conflict has arisen is presently the only and decisive issue in the case.

The decision below cannot be sustained without a finding by this Court that Title XIX of the Social Security Act mandates payment by the participating states of Medicaid funds for non-therapeutic abortions. *The Monrosa v. Carbon Black, Inc.*, 359 U.S. 180 (1958). Moreover such a holding by this Court would sanction the lower court's erroneous application of this Court's holdings in *Dandridge v. Williams*, 397 U.S. 471 (1970); *Jefferson v. Hackney*, 406 U.S. 535 (1971); and *N.Y.S. Department of Social Services v. Dublino*, 413 U.S. 405 (1972).

If one principle stands out among all others in these holdings it is that, within the context of the Social Security Act, congressional mandates must not lightly be inferred by the courts, but rather, such mandates must be clearly expressed by Congress. This principle was completely rejected by the lower court in this case, and must be, by this Court in order to affirm that court. Thus this Court should review the Court of Appeals decision in this case in order to rectify the confusion that has resulted from that decision.

VI.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court should grant the Petition for Writ of Certiorari in this case to review the judgment of the Court of Appeals for the Third Circuit.

Respectfully submitted,

NORMAN J. WATKINS
Deputy Attorney General
LAWRENCE SILVER
Deputy Attorney General
Chief, Civil Litigation
ROBERT P. KANE
Attorney General
Attorneys for Petitioners

Department of Justice
Capitol Annex Bldg.
Harrisburg, Pa. 17120

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of October, 1975, three typed copies of this Petition for a Writ of Certiorari were sent by United States mail, first class, postage prepaid to the office of R. Stanton Wettick, Esquire, Neighborhood Legal Services Association, 535 Fifth Avenue, 310 Plaza Building, Pittsburgh, Pennsylvania 15230.

I further certify that all parties required to be served have been served.

NORMAN J. WATKINS
Deputy Attorney General

Department of Justice
Capitol Annex Building
Harrisburg, Pa. 17120

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 73-846

Ann Doe; Betty Doe, a minor, by her mother as representative, Mother B. Doe; Cathy Doe; Donna Doe, a minor, by her mother as representative, Mother D. Doe; Elaine Doe; Jane Doe, a minor, by her father as representative, Father J. Doe; Nancy Doe; Patricia Doe; Ruth Doe; Sylvia Doe; and Toni Doe, each individually and on behalf of all other women similarly situated,

Plaintiffs,

vs.

Helene Wohlgemuth, individually and as Secretary of the Department of Public Welfare, Commonwealth of Pennsylvania; Roger Cutt, individually and as Assistant Deputy Secretary for Medical Services, Commonwealth of Pennsylvania; Glenn Johnson, individually and as Chief of the Bureau of Medical Assistance, Commonwealth of Pennsylvania; Edward Kalberer, individually and as Executive Director of the Allegheny County Board of Assistance; and the Department of Public Welfare, of the Commonwealth of Pennsylvania,

Defendants.

Before: Weis, Circuit Judge, Sorg, District Judge and Snyder, District Judge

OPINION AND ORDER

SNYDER, District Judge

The Plaintiffs, as welfare recipients and participants in the Pennsylvania Medical Assistance Program (PMAP), have filed their Complaint on behalf of themselves and all others similarly situated against the Pennsylvania Department of Public Welfare (Department) and certain of its Officers and/or Administrative Representatives. They challenge the State of Pennsylvania's refusal to provide reimbursement for the cost of abortions which they sought to have performed at Magee-Womens Hospital, Pittsburgh, Pennsylvania. The Department's Procedures hold that abortions may be performed under the PMAP only in the following situations:[1]

"1. There is documented medical evidence that continuance of the pregnancy may threaten the health or life of the mother;

2. There is documented medical evidence that the infant may be born with incapacitating physical deformity or mental deficiency; or

3. There is documented medical evidence that a continuance of a pregnancy resulting from legally established statutory or forcible rape or incest, may constitute a threat to the mental or physical health of a patient;

[1] While neither Counsel for the Plaintiffs nor for the Department referred this Court to a governing regulation, it was agreed that the above set forth criterion as excerpted from an Opinion Letter of the Attorney General dated August 6, 1973, correctly stated the requirements.

4. Two other physicians chosen because of their recognized professional competency have examined the patient and have concurred in writing; and

5. The procedure is performed in a hospital accredited by the Joint Commission on Accreditation of Hospitals."

Jurisdiction was claimed under 28 U.S.C. §§1343(3)[2] and (4)[3] as derived from 42 U.S.C. §1983.[4] The Plaintiffs claim that Title XIX of the Social Security Act requires reimbursement of physicians and hospital services for abortions which they elect; and they further claim the unrestricted right of such reimbursement under the Equal Protection Clause of the Fourteenth Amendment and the right to privacy as recognized in *Roe v. Wade*, 410 U.S. 113, 93

[2] *Section 1343*: "*Civil rights and elective franchise*

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

• • • • • • • •

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;"

[3] "(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

[4] *Section 1983*: "*Civil action for deprivation of rights*

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

S.Ct. 705, 35 L.Ed.2d 147 (1973) *rehearing denied* 410 U.S. 959, 93 S.Ct. 1409, 35 L.Ed.2d 694.

After hearing, the District Court on October 9, 1973, granted a Preliminary Injunction directing the Defendants to pay the reasonable costs of medical services rendered for any abortion performed in Allegheny County, Pennsylvania (as requested by the Plaintiffs) by a licensed physician on a woman otherwise eligible for PMAP benefits without additionally meeting the criterion hereinabove set forth.

On the same date, the Court filed an Order requesting the convening of a Three Judge Court, as there appeared to be a substantial constitutional question as to whether the Department's State-wide Regulations and Procedures were consistent with the Social Security Act or operated to deny the Plaintiffs equal protection of the law. See: *U.S. Dept. of Agriculture, et al. v. Jacinta Moreno,* U.S. , 93 S.Ct. 2821, 37 L.Ed.2d 782 (1973); *Wilwording v. Swenson,* 404 U.S. 249, 92 S.Ct. 407, 30 L.Ed.2d 418 (1971); *King v. Smith,* 392 U.S. 309, 88 S.Ct. 2128, 20 L.Ed.2d 1118 (1968); *Charleston v. Wohlgemuth,* 332 F. Supp. 1175 (E.D. Pa. 1971) *affirmed* 405 U.S. 970, 92 S.Ct. 1204, 31 L.Ed.2d 246. Determination of the Class was referred to the Three Judge Court. On October 12, 1973, Chief Judge Collins J. Seitz of the Third Circuit duly ordered the empaneling of the Three Judge Court. On October 25, 1973, the Defendants filed an Answer which denied that the Plaintiffs had standing to sue, that the Court had subject matter jurisdiction over the cause of action, and that the Plaintiffs' Complaint stated a cause of action for which relief could be granted.

A distillation of the PMAP shows that Pennsylvania is a participating State in a cooperative plan for providing reimbursement for medical services to the indigent under the Social Security Act (42 U.S.C. §1396 *et seq.*) The Act makes provision for medical services to the "categorically needy" (42 U.S.C. §1396a(a)(13), 45 CFR 249.10(a)(1)), or to the "medically needy" (42 U.S.C. §1396a(a)(10)(B), 45 CFR 249.10(a)(2)). Pennsylvania provides services to the "medically needy". 62 P.S. §441.1 reads as follows:

> "The following persons shall be eligible for medical assistance:
>
> (1) Persons who receive or are eligible to receive cash assistance grants under this article;
>
> (2) Persons who meet the eligibility requirements of this article for cash assistance grants except for citizenship durational residence and any eligibility condition or other requirement for cash assistance which is prohibited under Title XIX of the Federal Social Security Act; and
>
> (3) The medically needy."

It is noted that this last phrase is not otherwise defined. except by 62 P.S. §442.1:

> "A person shall be considered medically needy if he:
>
> (1) Resides in Pennsylvania, regardless of the duration of his residence or his absence therefrom: and
>
> (2) Meets the standards of financial eligibility established by the department with the approval of the Governor. In establishing these standards the department shall take into account (i) the funds certi-

fied by the Budget Secretary as available for medical assistance for the medically needy; (ii) pertinent Federal legislation and regulations; and (iii) the cost of living."

At the hearing before this Court, the parties stipulated that the allegations of fact contained in the Affidavits of R. Stanton Wettick, Jr., Douglass S. Thompson, C. Robert Youngquist, Henry J. Smith, and each of the named Plaintiffs would be accepted as true. From these, it is readily determined that the Plaintiffs had all been certified by the Department as eligible for participation in the PMAP; their pregnancies ranged from six to seventeen weeks; each of the named Plaintiffs were without assets to pay for an abortion or for any examination by physicians other than those at the Hospital or as would be provided by the Hospital; and, none of them were able to meet *all* of the requirements of the Department but, nevertheless, desired abortions. Prior to the issuance of the Injunction, each of the Plaintiffs unsuccessfully attempted to obtain an abortion from the Hospital (Magee-Womens Hospital), and the Hospital advised them that it could not provide the abortions unless, the abortions were either paid for in advance or the particular individuals submitted the documented matters required for reimbursement by the PMAP. The Hospital further advised each of the Plaintiffs that it had no procedures whereby doctors could be provided without charge to the Plaintiffs for the examination required by the PMAP. The Hospital then refused to provide abortions to each of the named Plaintiffs. It was further certified that the Hospital would have provided the abortions if the costs had been reimbursable under the PMAP.

Magee-Womens Hospital is a non-profit institution located in the City of Pittsburgh and is an approved provider of health services under the PMAP. The prior practice of the physicians associated with the Hospital was to schedule abortions within the first eleven weeks of pregnancy because the medical procedures used for abortion during that time period involved significantly lower risks of morbidity and mortality than such procedures at any later stage of pregnancy. The Hospital did not provide abortions to women more than twenty weeks pregnant without special permission and only in extremely unusual cases. Family Planning Services were provided to Medical Assistance recipients, and pharmacists filled prescriptions written by physicians at the Hospital for contraceptives. The costs for these services were reimbursed by the Department, regardless of whether the recipient was married or unmarried.

Following the United States Supreme Court decisions in *Roe v. Wade, supra,* and *Doe v. Bolton,* 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201 (1973) *rehearing denied* 410 U.S. 959, 93 S.Ct. 1410, 35 L.Ed.2d 694, the Hospital began providing abortions to all Medical Assistance recipients without requiring the documented evidence from a performing physician and two other physicians, and had been submitting claims for reimbursement to the Department (about sixty per month). The Department rejected each of the claims for reimbursement because of the Hospital's failure to comply with the Department's Procedures. Effective October 1, 1973, the Hospital provided abortions only if the patient could pay for the abortion or could furnish the documented medical evidence required by the Department.

The Affidavit of each of the Plaintiffs substantially set forth in similar language that each of the "Does" was

unmarried and pregnant and had made the decision not to carry the pregnancy through to birth. Ann Doe elected to have an abortion because of "medical problems I presently have and also because I do not want any more children." She indicated she was refused abortion because she did not have the money or the necessary documentation. Betty Doe elected abortion "because a birth at my age would be a severe burden on my life as well as my family." Cathy Doe's decision was because "I already have four children and another child would further burden our financial plight and cause severe stress on me." Donna Doe's decision was "because I am still in high school and do not wish to have a baby at this time." Elaine Doe's decision was "because my two children and myself are already in financial difficulty and a birth at this time would be a severe burden on my emotional state." Jane Doe's decision was "because of the burden and interruption to my personal life that the birth would cause." Nancy Doe's decision was "because of the burden and interruption to my personal life that the birth would cause." Patricia, Ruth, Sylvia, and Toni, all had substantially the same reasons as Nancy Doe.

At the hearing, the Three Judge Court requested the Attorney General to secure an affidavit relating to the intention of the Department with respect to any change that might be contemplated regarding its requirements for reimbursement for abortions. Subsequently, an Affidavit was filed by an Assistant Attorney General, to the effect that there was no intention on the part of the Department to change its current policies.

The Three Judge Court also requested the Assistant Attorney General to procure from the United States Department of Health, Education and Welfare, a statement

of their position on reimbursement for abortions. He subsequently filed a copy of a Memorandum of the United States as Amicus Curiae in the cases of *New York State Department of Social Services, et al. v. Elizabeth Linda Klein, et al.*, No. 72-770, and *Nassau County Medical Center, et al. v. Elizabeth Linda Klein, et al.*, No. 72-803, October Term 1972, dated May 1973, which took the position, in substance, that the Social Security Act *did not require*, but would not prevent, a Federally funded State Medicaid Program to pay for abortions that were not medically indicated. New York had limited coverage under its Medicaid Program for "the cost of care, services and supplies, which are necessary to prevent, diagnose, correct or cure conditions in the person that cause acute suffering, endanger life, result in illness or infirmity, interfere with his capacity for normal activity, or threaten some significant handicap." The State, in an "administrative letter", interpreted the provision as covering only "necessary and medically indicated care" and, therefore, denied "elective abortions not medically indicated." *City of New York v. Wyman*, 30 N.Y.2d 537, 281 N.E.2d 180 (1972). No violation of the Federal program was found in this situation.

On December 27, 1973, this Court notified the Attorney General that the Amicus Curiae Brief filed in the *Klein* cases did not satisfy the requirements of the Three Judge Court, and requested that an affidavit be supplied with respect to the position of the Department of H.E.W. on the question of reimbursement of the cost of abortions, whether medically indicated of not. On January 12, 1973, the Assistant Attorney General notified the Court by letter that he was unable to secure the cooperation of the United States with respect to obtaining an affidavit of the type

requested by the Court. He stated that the Brief in the *Klein* cases had been submitted in lieu of an affidavit and accurately reflected the position of the United States in the matter. Apparently, however, the Federal Government would share in the costs of abortions under the terms and provisions of the State Medicaid Program.[5]

It must be noted that in dealing with the issues in this case we are precluded from the treatment of abortion on moral grounds, nor are we dealing with abortion in its criminal aspects. We must follow the course which recognizes that the law does not represent itself as a moral code, but rather, as a body of rules wherein the majority of the people impose their will, and, within constitutional limits, invade the freedom of the individual, in the interest of public health and welfare. Whatever may be the private view of the individual or group of individuals, or the mem-

[5] The Attorney General of Pennsylvania in the letter of August 6, 1973, set forth the following at footnote 4 of the letter:

"[4] Even before *Wade* and *Bolton, supra*, the Federal statute and regulations permitted reimbursement to the states for the cost of abortions. In response to an inquiry as to whether or not the Federal Government reimbursed the states for abortions under the Medical Assistance Program, the Federal Medical Services Administration, which administers the program, replied:

"• • • The following statement may be used to describe M.S.A.'s policy on abortions:

The position taken by M.S.A. on abortions is that the Social Security Act and the HEW regulations provide for Federal matching of state expenditures for all kinds of medical care and services, including patient and hospital services, outpatient hospital services, physician services, drugs, etc. If the State Medicare Program paid for these services whether for abortion or any other medical services, the Federal Government shared the cost with the state.' "

bers of this Court, we are bound by the now established principle of law that a negation of an individual's choice in the matter of abortion during the first trimester of pregnancy is an unwarranted invasion of that person's fundamental rights as established by the Fourteenth Amendment to the Constitution of the United States.

The Supreme Court has said (*Roe v. Wade, supra,* 93 S.Ct. 726, 728):

> "This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is . . . in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."
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> * * * * * * * *
>
> "Although the results are divided, most of these courts have agreed that the right of privacy, however based, is broad enough to cover the abortion decision; that the right, nonetheless, is not absolute and is subject to some limitations; and that at some point the state interests as to protection of health, medical standards, and prenatal life, become dominant. We agree with this approach."

Thus, we are here concerned with "fundamental rights" which must be balanced against "*compelling* state interests" where legislative enactments including Statewide Regulations pursuant thereto must be narrowly drawn to express only state interests. *Kramer v. Union Free School District,* 395 U.S. 621, 627, 89 S.Ct. 1886, 1890, 23 L.Ed.2d 583 (1969); *Shapiro v. Thompson,* 394 U.S.

618, 634, 89 S.Ct. 1322, 1331, 22 L.Ed.2d 600 (1969); *Griswold v. Connecticut*, 381 U.S. 479, 485, 85 S.Ct. 1678, 1682, 14 L.Ed.2d 510 (1965); *Aptheker v. Secretary of State*, 378 U.S. 500, 508, 84 S.Ct. 1659, 1664, 12 L. Ed.2d 992 (1964); *Sherbert v. Verner*, 374 U.S. 398, 406, 83 S.Ct. 1790, 1795, 10 L.Ed.2d 965 (1963); *Cantwell v. Connecticut*, 310 U.S. 296, 307-308, 60 S.Ct. 900, 904-905, 84 L.Ed. 1213 (1940). See *Eisenstadt v. Baird*, 405 U.S. 438, 460, 463-464, 92 S.Ct. 1029, 1042, 1043-1044, 31 L.Ed.2d 349 (1972) (White, J., concurring).

I. STANDING

The Defendants contend that the Plaintiffs have no standing to bring this action seeking reimbursement to the Hospital. Each of the Plaintiffs in this case is a participant in the Medicaid Program established and regulated by Sub-Chapter XIX of the Social Security Act of 1953, as amended, Section 1396 *et seq.* of Title 42 U.S.C. Each of the Plaintiffs desired an abortion and in none of these cases was there an attempt to fully comply with the requirements of the PMAP. This Court finds that the State's Procedures, limiting reimbursement as indicated, operated to prevent the Plaintiffs from obtaining the abortions they sought. It was admitted that the Hospital would have furnished the Plaintiffs with the abortions if these abortions had been reimbursable under the PMAP.

At the threshold of the question of standing is the concept recently set forth by the Supreme Court of the United States in *Goldberg v. Kelly*, 396 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970), (involving the determination that procedural due process under the Fourteenth Amendment required an evidentiary hearing before termination of welfare benefits under the Aid to Families with Dependent Children Program (AFDC)), (at footnote 8, 25 L.Ed.2d at 295):

> "It may be realistic today to regard welfare entitlements as more like 'property' than a 'gratuity.' Much of the existing wealth in this country takes the form of rights that do not fall within traditional common-law concepts of property. It has been aptly noted that '[s]ociety today is built around entitlement. The automobile dealer has his franchise, the doctor and lawyer their professional licenses, the worker his union membership, contract, and pension rights, the executive his contract and stock options; all are devices to aid security and independence. Many of the most important of these entitlements now flow from government: subsidies to farmers and businessmen, routes for airlines and channels for television stations; long term contracts for defense, space, and education; social security pensions for individuals. Such sources of security, whether private or public, are no longer regarded as luxuries or gratuities; to the recipients they are essentials, fully deserved, and in no sense a form of charity. It is only the poor whose entitlements, although recognized by public policy, have not been effectively enforced.' Reich, Individual Rights and Social Welfare; The Emerging Legal Issues, 74 Yale LJ 1245, 1255 (1965). See also Reich, The New Property, 73 Yale LJ 733 (1964)."

The Supreme Court thus held in Goldberg (25 L.Ed. 2d at pp. 295-297):

> "Appellant does not contend that procedural due process is not applicable to the termination of welfare

benefits. Such benefits are a matter of statutory entitlement for persons qualified to receive them. Their termination involves state action that adjudicates important rights. The constitutional challenge cannot be answered by an argument that public assistance benefits are 'a "privilege" and not a "right." ' *Shapiro v Thompson,* 394 US 618, 627 n 6, 22 L Ed 2d 600, 611, 89 S Ct 1322 (1969). Relevant constitutional restraints apply as much to the withdrawal of public assistance benefits as to disqualification for unemployment compensation, *Sherbert v Verner,* 374 US 398, 10 L Ed 2d 965, 83 S Ct 1790 (1963); or to denial of a tax exemption, *Speiser v Randall,* 357 US 513, 2 L Ed 2d 1460, 78 S Ct 1332 (1958); or to discharge from public employment, *Slochower v Board of Higher Education,* 350 US 551, 100 L Ed 692, 76 S Ct 637 (1956). The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss,' *Joint Anti-Fascist Refugee Committee v McGrath,* 341 US 123, 168, 95 L Ed 817, 852, 71 S Ct 624 (1951) (Frankfurter, J., concurring), and depends upon whether the recipient's interest in avoiding that loss outweights the governmental interest in summary adjudication. Accordingly, as we said in *Cafeteria & Restaurant Workers Union v McElroy,* 367 US 886, 895, 6 L Ed 2d 1230, 1236, 81 S Ct 1743 (1961), 'consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.' See also *Hannah v*

Larche, 363 US 420, 440, 442, 4 L Ed 2d 1307, 1320, 1321, 80 S Ct 1502 (1960).

It is true, of course, that some governmental benefits may be administratively terminated without affording the recipient a pre-termination evidentiary hearing. But we agree with the District Court that when welfare is discontinued, only a pre-termination evidentiary hearing provides the recipient with procedural due process. Cf. *Sniadach v Family Finance Corp.,* 395 US 337, 23 L Ed 2d 349, 89 S Ct 1820 (1969). For qualified recipients, welfare provides the means to obtain essential food, clothing, housing, and medical care. Cf. *Nash v Florida Industrial Commission,* 389 US 235, 239, 19 L Ed 2d 438, 442, 88 S Ct 362 (1967). Thus the crucial factor in this context—a factor not present in the case of the blacklisted government contractor, the discharged government employee, the taxpayer denied a tax exemption, or virtually anyone else whose governmental entitlements are ended—is that termination of aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits. Since he lacks independent resources, his situation becomes immediately desperate. His need to concentrate upon finding the means for daily subsistence, in turn, adversely affects his ability to seek redress from the welfare bureaucracy."

Relevant constitutional restraints therefore apply to public assistance benefits and their recipients, and there is standing in welfare recipients to challenge State-wide Regulations which exclude welfare recipients who would otherwise be covered by Medical Assistance. *Shapiro v. Thompson, supra; King v. Smith, supra.* Cf. *Data Process-*

ing Service v. Camp, 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed. 2d 184 (1970) (holding that the question of standing is the question of whether the interest sought to be protected by the complainant is arguably within the zone of interest to be protected or regulated by the statute or constitutional guarantee in question, 25 L.Ed.2d at 188). When a person or a family has a spiritual stake in First Amendment values sufficient to give standing to raise issues concerning the "establishment" clause and the "free exercise" clause, *Abbington School District v. Schempp,* 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963); or when standing may reflect "aesthetic, conservational, and recreational, as well as economic values", *Office of Communication of United Church of Christ v. F.C.C.,* 123 U.S. App. D.C. 328, 334-340, 359 F.2d 994, 1000-1006 (1966); then standing certainly arises from the economic injury on which the Petitioners here rely. *U.S. Dept. Agriculture v. Moreno, supra; Goldberg v. Kelly, supra; Stewart v. Wohlgemuth,* 355 F.Supp. 1212 (W.D. Pa. 1972). The named Plaintiffs thus have standing to bring the instant action.

II. CLASS ACTION DETERMINATION

A difficult question is involved in the determination of the proper class. The Plaintiffs allege that they were females of child bearing age and all were certified by the Department as eligible under the PMAP. The Plaintiffs then allege that they brought this action on behalf of themselves and all others similarly situated pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure.[6] The

[6] Rule 23(b)(2) provides: "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole".

Primary Judge refused to order the case to be maintained as a class action, and deferred the decision of this question to the Three Judge Court.

After due consideration, this Court determines that the action shall not be maintained as a class action because the differing individual circumstances which exist would unnecessarily complicate this action, and thus, a class action under Rule 23 Fed.R.Civ.P. would not be a superior method for adjudication of this controversy. See: *Tindall v. Hardin,* 337 F.Supp. 563 (W.D. Pa. 1972) *affirmed sub nominee Carter v. Butz,* 479 F.2d 1084 (3rd Cir. 1973). See also *Stewart v. Wohlgemuth, supra.* This is particularly true in light of the considerations which are involved in the "trimester" holdings of the United States Supreme Court in *Roe v. Wade, supra,* and in *Doe v. Bolton, supra;* and the reversal of *Klein v. Nassau County Medical Center,* 347 F.Supp. 496 (E.D.N.Y. 1972) (Three Judge Court), at U.S. , 93 S.Ct. 2747, 37 L.Ed.2d 152 (1973), where the judgment was vacated and the case remanded to the United States District Court for further consideration in light of *Roe v. Wade, supra,* and *Doe v. Bolton, supra.*

In view of the fact that the Court is holding the Regulations and/or Procedures of the PMAP to be unconstitutional, as more particularly hereinafter set forth, we are confident that the Defendants will respect the Order of this Court, and we do not at this time need to become involved in the complexities of a class action. Separate actions can be disposed of as they may arise. See *Bailey v. Patterson,* 369 U.S. 31, 82 S.Ct. 549, 7 L.Ed.2d 512 (1962); *Turner v. Colonial Finance Corp.,* 467 F.2d 202 (1st Cir. 1972). The Court, therefore, directs that the cases not be maintained as a class action.

It is necessary, therefore, with respect to the Plaintiffs here involved, that we decide the two basic attacks made against the Regulations and/or Procedures of the PMAP: (1) that the Pennsylvania Regulations are inconsistent with the Social Security Act, and thereby violate the Supremacy Principle, and (2) that the Pennsylvania Regulations create an unlawful distinction (in violation of the Equal Protection Clause) between indigent women who choose to carry their pregnancies to birth and indigent women who choose to terminate their pregnancies by abortion.

III. THE PENNSYLVANIA MEDICAL ASSISTANCE PROGRAM IS NOT INCONSISTENT WITH THE SOCIAL SECURITY ACT

The Federal Government makes substantial funds available to those States desiring to participate in the program to provide medical care to individuals and families "whose income and resources are insufficient to meet the costs of necessary medical services", Title XIX of the Social Security Act, 42 U.S.C. §1396 *et seq*. Under the Act, participating States are required to provide medical services to individuals and families who are eligible for cash grant assistance under any of the Federal categories of assistance, such as, Aid to the Blind, Aid to the Permanently and Totally Disabled, Old Age Assistance, Aid to Families with Dependent Children, 42 U.S.C. §1396a(a)(13). These individuals and families are considered the "categorically needy". 45 CFR 249.10(a)(1).

A second group of individuals termed "medically needy" may also benefit under this Act, and is composed of those persons whose income is too great to qualify for

cash assistance as "categorically needy", and yet insufficient to meet the costs of medical care. 42 U.S.C. §1396a(a)(10)(B). This group also consists of individuals benefiting from Federal money available to meet the cost of administration of a Medical Assistance Program, or others who do not come under one of the Federal categories. 45 CFR 248.10(d)(1). As stated before, Pennsylvania has elected to extend medical benefits to the "medically needy". 62 P.S. §441.1 *et seq*.

A statutory requirement for participating States is that they must provide certain minimal medical services under the program. For "categorically needy" persons, the State must provide: (1) inpatient hospital services; (2) outpatient hospital services; (3) other laboratory and X-ray services; (4) skilled nursing facility services, screening and diagnosis of children, family planning services and supplies furnished to individuals of child bearing age; and (5) physicians' services furnished by a physician whether in the office, patient's home, hospital or elsewhere. 42 U.S.C. §1396a(a)(13)(B). For "medically needy" persons, the State has the option of providing from among the above five services, and Pennsylvania has elected to provide the five services as minimal services for the "medically needy", with the exception of the "screening and diagnosis of children."

The Plaintiffs contend that the abortion services which Pennsylvania has limited by its Procedures fall squarely within the category of "physicians' services" which are medically necessary and, therefore, within the requirements of the Social Security Act. Their argument is stated as follows (pp. 20 and 21 Plaintiffs' Brief):

> "Under the Federal statutory scheme, inpatient hospital services fall into the same category as phy-

sicians' services i.e. they are minimally required for the 'categorically needy' and they are an elective minimal requirement by Pennsylvania as to the 'medically needy.' 42 U.S.C. §1396a(a)(13)(B) and (C). Inpatient hospital services (other than services in an institution for tuberculosis or mental diseases) are defined as follows by H.E.W. regulations:

'Inpatient hospital services' are those items and services *ordinarily furnished by the hospital* for the care and treatment of inpatients provided under the direction of a physician or dentist in an institution maintained primarily for treatment and care of patients with disorders other than tuberculosis or mental diseases and which is licensed. . . . 45 C.F.R. 249.10 (b)(1) (emphasis added)'

While a hospital may be free under *Doe v. Bolton, supra,* to refuse to permit abortive surgery within its confines, nothing legally prevents a hospital from including abortions as an 'ordinarily furnished' service. (Magee-Womens Hospital, for example, has been performing abortions on a regular basis.) And under the above H.E.W. regulations, the State is not free to refuse to reimburse hospitals for services they are providing on a regular basis. Consequently, Pennsylvania's policy of refusing reimbursement for abortion services, at least to the extent such reimbursement is for inpatient hospital services, is a violation of Federal law."

* * * * * * *

"After the Supreme Court decisions in *Roe v. Wade, supra,* and *Doe v. Bolton, supra,* it is clear that absolutely no State law can constitutionally exclude abortion services from the scope of practice of a physician. Consequently, Pennsylvania's practice of refusing to reimburse for abortion services, at least to the extent such services represent physicians' services, violates the Social Security Act in that it does not provide for the minimum level of coverage required by the Act."

The question remains: Whether the Pennsylvania Procedures governing reimbursement for costs of abortions are compatible with the Federal Statute? We believe this question must be answered in the affirmative.

In order to qualify for Federal funding, state programs must satisfy the requirements of 42 U.S.C. §1396a, including the requirement of §1396a(a)(17) that "a state plan for medical assistance must include reasonable standards * * * for determining eligibility for and the extent of medical assistance under the plan which (A) are consistent with the objectives of this subchapter, * * *". Physicians' services with regard to an abortion may be considered to fall within the purview of necessary medical services under Title XIX, and the Department does not dispute this fact. While nowhere in the Act is there a specific provision authorizing medical assistance payments for abortions, there are a number of sections that, when considered together with corollary regulations, must be interpreted to permit reimbursement for the costs of abortions performed. These include: 42 U.S.C. §1396d(a)1, and 45 CFR 249.10(b)(1) which pertain to inpatient hospital services; 42 U.S.C. §1396 d(a)(5) and 45 CFR 249.10(b)(5) which apply to physicians' services; 42 U.S.C. §1396d(a)(6) and 45 CFR 249.10(b)(6) which relate to medical care or any other type of remedial care recognized under State law, furnished by licensed prac-

titioners within the scope of their practice as defined by State law; and 42 U.S.C. §1396d(a)(4) and 45 CFR 249.10(a)(10) which would include services in relation to family planning.

But, even if we assume, as do the Plaintiffs, that abortion payments are clearly authorized under Title XIX of the Social Security Act, nevertheless, Congress has given the States great latitude in establishing standards for the administration of the various plans, under the doctrine of a "*scheme of cooperative federalism.*" (Emphasis supplied). *N Y S Dept. of Social Services v. Dublino*, U.S. , S. Ct. , 37 L. Ed. 2d 688 (1973). (The Social Security Act does not bar a state from independently requiring individuals to accept employment as a condition for receipt of federally funded aid to families with dependent children); *Jefferson v. Hackney*, 406 U.S. 535, 92 S. Ct. 1724, 32 L. Ed. 2d 285 (1972). (Allowing Texas to grant the full standard of need assistance under Old Age Assistance while granting only 95% of the full standard of need to Aid for Blind and Aid for Permanently and Totally Disabled, and 75% of the full standard of need to Aid to Families with Dependent Children, AFCD); *Cf. King v. Smith*, supra. (Invalidating the Alabama "substitute father" regulation which denied AFDC payments to children of a mother who "cohabits" in or outside her home with any single or married man, holding that: 20 L. Ed. 2d at 1127):

> "Alabama's argument based on its interest in discouraging immorality and illegitimacy would have been quite relevant at one time in the history of the AFCD program. However, subsequent developments clearly establish that these state interests are not presently legitimate justifications for AFCD disqualification. Insofar as this or any similar regulation is based on the State's asserted interest in discouraging illicit sexual behavior and illegitimacy, it plainly conflicts with federal law and policy."

Thus, the question becomes: Whether or not Pennsylvania may, by means of its Regulations and/or Procedures, determine when the performance of an abortion becomes a medical necessity?

In *Dandridge v. Williams*, 397 U.S. 471, 90 S. Ct. 1153, 25 L. Ed. 2d 491 (1970), the Supreme Court of the United States upheld a Maryland maximum grant regulation limiting the total amount of aid any one family unit could receive under the State's Aid to Families with Dependent Children Program (AFDC) against attack on the grounds that it is in conflict with the Social Security Act of 1935 and with the Equal Protection Clause of the Fourteenth Amendment. After referring to the legislative history of the program, the Court determined that Maryland was entitled to establish its own standard of need with regard to each eligible family unit without contravening the purposes of the AFDC Program, holding as follows (25 L. Ed. 2d at pp. 496-498):

> "In its original opinion the District Court held that the Maryland regulation does conflict with the federal statute, and also concluded that it violates the Fourteenth Amendment's equal protection guarantee. After reconsideration on motion, the court issued a new opinion resting its determination of the regulation's invalidity entirely on the constitutional ground. Both the statutory and constitutional issues have been fully briefed and argued here, and the judg-

ment of the District Court must, of course, be affirmed if the Maryland regulation is in conflict with either the federal statute or the Constitution. We consider the statutory question first, because if the appellees' position on this question is correct, there is no occasion to reach the constitutional issues. *Ashwander v. TVA*, 297 U.S. 288, 346-347, 80 L. Ed. 688, 710, 711, 56 S. Ct. 466 (Brandeis, J., concurring); *Rosenberg v. Fleuti*, 374 U.S. 449, 10 L. Ed. 2d 1000, 83 S. Ct. 1804.

I.

The appellees contend that the maximum grant system is contrary to §402(a)(10) of the Social Security Act, as amended, which requires that a state plan shall 'provide . . . that all individuals wishing to make application for aid to families with dependent children shall have opportunity to do so, and that aid to families with dependent children shall be furnished with reasonable promptness to all eligible individuals.' The argument is that the state regulation denies benefits to the younger children in a large family. Thus, the appellees say, the regulation is in patent violation of the Act, since those younger children are just as 'dependent' as their older siblings under the definition of 'dependent child' fixed by federal law. See *King v. Smith*, 392 U.S. 309, 20 L. Ed. 2d 1118, 88 S. Ct. 2128. Moreover, it is argued that the regulation, in limiting the amount of money any single household may receive, contravenes a basic purpose of the federal law by encouraging the parents of large families to 'farm out' their children to relatives whose grants are not yet subject to the maximum limitation.

It cannot be gainsaid that the effect of the Maryland maximum grant provision is to reduce the per capita benefits to the children in the largest families. Although the appellees argue that the younger and more recently arrived children in such families are totally deprived of aid, a more realistic view is that the lot of the entire family is diminished because of the presence of additional children without any increase in payments. Cf. *King v. Smith*, *supra*, at 335 n. 4, 20 L. Ed. 2d at 1135 (Douglas, J., concurring). It is no more accurate to say that the last child's grant is wholly taken away than to say that the grant of the first child is totally rescinded. In fact, it is the *family* grant that is affected. Whether this per capita diminution is compatible with the statute is the question here. For the reasons that follow, we have concluded that the Maryland regulation is permissible under the federal law.

In *King v. Smith*, *supra*, we stressed the States' 'undisputed power,' under these provisions of the Social Security Act, 'to set the level of benefits and the standard of need.' Id., at 334, 20 L. Ed. 2d at 1135. We described the AFDC enterprise as 'a scheme of cooperative federalism,' id., at 316, 20 L. Ed. 2d at 1125, and noted carefully that '[t]here is no question that States have considerable latitude in allocating their AFDC resources, since each State is free to set its own standard of need and to determine the level of benefits by the amount of funds it devotes to the program.' Id., at 318-319, 20 L. Ed. 2d at 1126."

In the case before this Court, as noted previously, Congress was silent with respect to specific authorization

of medical assistance for abortions. Pennsylvania standards must be scrutinized without curtailment by Congressional action and the State Regulations and/or Procedures must be given great latitude in providing for the administration of the Program. We, therefore, feel compelled to find Pennsylvania's Regulations do not conflict with Title XIX of the Social Security Act.

IV. PENNSYLVANIA'S PROCEDURES RESTRICTING MEDICAL REIMBURSEMENT FOR ABORTIONS VIOLATE EQUAL PROTECTION CLAUSE OF FOURTEENTH AMENDMENT

The Plaintiffs further contend that since pregnant women need medical services in connection with their pregnancies, a distinction between indigent pregnant women who choose to carry their pregnancies to birth and indigent pregnant women who choose to terminate their pregnancies by abortion, deprive women who choose abortion of their equal protection rights guaranteed by the Fourteenth Amendment to the United States Constitution.

The Supreme Court in a recent decision of *Cleveland Board of Education, et al. v. Jo Carol LaFleur, et al.*, and *Susan Cohen v. Chesterfield County School Board, et al.*, 42 U.S. Law Week 4186, decided January 21, 1974, in an Opinion by Justice Stewart, speaking for Mr. Justices Brennan, White, Marshall, and Blackmun, and concurred in by Justice Douglas, held unconstitutional certain regulations of Cleveland, Ohio and Chesterfield County, West Virginia, relating to mandatory leave rules applied to pregnant school teachers and stated the following (at p. 4189):

> "This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment. *Roe v. Wade*, 410 U.S. 113; *Loving v. Virginia*, 388 U.S. 1, 12; *Griswold v. Connecticut*, 381 U.S. 479; *Pierce v. Society of Sisters*, 268 U.S. 510; *Meyer v. Nebraska*, 262 U.S. 390. See also *Prince v. Massachusetts*, 321 U.S. 158; *Skinner v. Oklahoma*, 316 U.S. 535. As we noted in *Eisenstadt v. Baird*, 405 U.S. 438, 453, there is a right 'to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.'
>
> By acting to penalize the pregnant teacher for deciding to bear a child, overly restrictive maternity leave regulations can constitute a heavy burden on the exercise of these protected freedoms. Because public school maternity leave rules directly affect 'one of the basic civil rights of man,' *Skinner v. Oklahoma, supra;* at 541, the Due Process Clause of the Fourteenth Amendment requires that such rules must not needlessly, arbitrarily, or capriciously impinge upon this vital area of a teacher's constitutional liberty."

Under traditional Equal Protection standards, once the State chooses to pay for medical services rendered in connection with the pregnancies of some indigent women, it cannot refuse to pay for the medical services rendered in connection with the pregnancies of other indigent women electing abortion, unless the disparate treatment supports a legitimate State interest. *U.S. Dept. of Agriculture v. Moreno, supra; Weber v. Aetna Casualty & Surety Co.,*

406 U.S. 164, 92 S. Ct. 1400, 31 L. Ed. 2d 768 (1972); *Reed v. Reed*, 404 U.S. 71, 92 S. Ct. 251, 30 L. Ed. 2d 225 (1971); *Eisenstadt v. Baird, supra.* The Court in *King v. Smith, supra,* well summarized public welfare policy as follows (20 L. Ed. 2d at pp. 1127, 1130):

> "A significant characteristic of public welfare programs during the last half of the 19th century in this country was their preference for the 'worthy' poor. Some poor persons were thought worthy of public assistance, and others were thought unworthy because of their supposed incapacity for 'moral regeneration.' *H. Leyendecker, Problems and Policy in Public Assistance* 45-57 (1955); *Wedemeyer & Moore, The American Welfare System,* 54 Calif L. Rev. 326, 327-328 (1966). This worthy-person concept characterized the mothers' pension welfare programs, which were the precursors of AFDC. See *W. Bell, Aid to Dependent Children* 3-19 (1965). Benefits under the mothers' pension programs, accordingly, were customarily restricted to widows who were considered morally fit. See *Bell, supra,* at 7; *Leyendecker, supra,* at 53."
>
> * * * * * * *
>
> "The most recent congressional amendments to the Social Security Act further corroborate that federal public welfare policy now rests on a basis considerably more sophisticated and enlightened than the 'worthy-person' concept of earlier times. State plans are now required to provide for a rehabilitative program of improving and correcting unsuitable homes, §402(a), as amended by §201(a)(1)(B), 81 Stat 877, 42 U.S.C §602(a)(14) (1964 ed., supp. III); §406, as amended by §201(f), 81 Stat 880, 42 U.S.C. §606 (1964 ed., Supp. III); to provide voluntary family planning services for the purpose of reducing illegitimate births, §402(a), as amended by §201(a)(1)(C), 81 Stat 878, 42 U.S.C. §602(a)(15) (1964 ed., Supp. III); and to provide a program for establishing the paternity of illegitimate children and securing support for them, §402(a), as amended by §201(a)(1)(C), 81 Stat 878, 42 U.S.C. §602(a)(17) (1964 ed., Supp. III)."

Pennsylvania seeks to sustain its Procedures not on the basis that there is a lack of discrimination, but that there is no "invidious" discrimination and that the Procedures are rationally supportable on valid grounds.

The Department first of all contends that in the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. The Department states in its Brief (at p. 8):

> ". . . A legislature may address a problem one step at a time or even select one phase of one field and apply a remedy there, neglecting others. So long as its judgments are rational, and not invidious, the legislature's efforts to tackle the problems of the poor and the needy are not subject to a constitutional straightjacket. The very complexity of the problems suggests that there will be more than one constitutionally permissible method of solving them." Citing *Dandridge v. Williams, supra; Jefferson v. Hackney, supra.*

An analysis of *Dandridge v. Williams, supra,* however, does not give support to the State's contention in this case. In *Dandridge,* a fiscal basis was found by the Court

for the State's interest in encouraging employment and avoiding discrimination between welfare families and the families of the working poor; for by combining the limit on a recipient's grant with permission to retain money earned, without reduction in the amount of the grant, Maryland provided an incentive to seek gainful employment. Certainly, no such fiscal interest can be promoted in the instant case where it is obvious that the cost of an abortion may well be far less than the cost of prenatal care, childbirth, and post partum treatment. Yet the State will pay the latter costs for any Medical Assistance recipient who does not elect abortion.

The Supreme Court in *Hagans v. Lavine, Commissioner of New York State Department of Social Services,* 42 L.W. 4381 at 4385, had this to say about the *Dandridge* case:

> "In *Dandridge v. Williams, supra,* AFDC recipients challenged the Maryland maximum grant regulation on equal protection grounds. We held that the issue should be resolved by inquiring whether the classification had a rational basis. Finding that it did, we sustained the regulation. But *Dandridge* evinced no intention to suspend the operation of the Equal Protection Clause in the field of social welfare law. State laws and regulations must still 'be rationally based and free from invidious discrimination.' 397 U.S. at 487. See *Jefferson v. Hackney,* 406 U.S. 535, 546 (1972); *Carter v. Stanton, supra,* 405 U.S. at 671; cf. *San Antonio School District v. Rodriguez,* 411 U.S. 1 (1973)."

Of course, a State cannot justify on the basis of fiscal integrity a regulation which would exclude a woman from Medical Assistance reimbursement because she has decided

to exercise a constitutional right related to the decision as to whether to bear or beget a child. Thus, in *Shapiro v. Thompson, supra,* (which involved a residency requirement), the Court stated as follows (22 L. Ed. 2d at pp. 613, 614):

> "Alternatively, appellants argue that even if it is impermissible for a State to attempt to deter the entry of all indigents, the challenged classification may be justified as a permissible state attempt to discourage those indigents who would enter the State solely to obtain larger benefits. We observe first that none of the statutes before us is tailored to serve that objective. Rather, the class of barred newcomers is all-inclusive, lumping the great majority who come to the State for other purposes with those who come for the sole purpose of collecting higher benefits. In actual operation, therefore, the three statutes enact what in effect are nonrebuttable presumptions that every applicant for assistance in his first year of residence came to the jurisdiction solely to obtain higher benefits. Nothing whatever in any of these records supplies any basis in fact for such a presumption.
>
> More fundamentally, a State may no more try to fence out those indigents who seeks higher welfare benefits than it may try to fence out indigents generally. Implicit in any such distinction is the notion that indigents who enter a State with the hope of securing higher welfare benefits are somehow less deserving than indigents who do not take this consideration into account. But we do not perceive why a mother who is seeking to make a new life for herself and her children should be regarded as less de-

serving because she considers, among other factors, the level of a State's public assistance. Surely such a mother is no less deserving than a mother who moves into a particular State in order to take advantage of its better educational facilities."

* * * * * * *

"We recognize that a State has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures, whether for public assistance, public education, or any other program. But a State may not accomplish such a purpose by invidious distinctions between classes of its citizens. It could not, for example, reduce expenditures for education by barring indigent children from its schools. Similarly, in the cases before us, appellants must do more than show that denying welfare benefits to new residents saves money. The saving of welfare costs cannot justify an otherwise invidious classification."

The Assistant Attorney General also contends that since the basic requirements as set forth in the Department's Procedures were those approved by the Joint Commission on Accreditation of Hospitals that, therefore, "An examination of the requirements clearly reveals that although they may not serve with mathematical nicety, there can be no doubt that the instances where the Commonwealth will pay for an abortion are reasonable and logical. These requirements are set forth not by judges or lawyers, but by doctors who are immediately concerned with the problems of abortion." (Defendant's Brief p. 9). The difficulty with this position is that in this case we are not concerned with the views that doctors may have on the question of where, or under what circumstances, they

might best choose to perform abortions. In each of the individual Plaintiff's allegations, as admitted by the Defendants, there were doctors available who did not consider it necessary that there be concurrence by two other physicians before the abortion was performed. These doctors did not consider that the abortion was necessary because of a threat to the health of the patient if the pregnancy was carried to term, or that it was necessary because the infant might be born with an incapacitating physical deformity or mental deficiency, or that it was necessary because the pregnancy resulted from statutory or forcible rape, which may have constituted a threat to the mental or physical health of the patient.

Roe v. Wade, supra, must be considered as dispositive of the contentions in the instant case. The Supreme Court held that the right of privacy was broad enough to include the abortion decision. (410 U.S. 153, 154, 93 S. Ct. 727, 35 L. Ed. 2d 177). Freedom of choice was recognized as a fundamental right during the first three months of pregnancy to be exercised by the pregnant woman in consultation with her physician free from State interference. The Court stated (410 U.S. at 163, 93 S. Ct. at 732, 35 L. Ed. 2d at 183):

> "This means, . . . that, for the period of pregnancy prior to this 'compelling' point, *the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that in his medical judgment, the patient's pregnancy should be terminated.* If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State." (Emphasis added)

During this first trimester, State regulations impinging in any manner with a fundamental right must be examined

with close scrutiny by the Courts. Thereafter, however, the State's legitimate interest in potential life becomes *compelling* and the State may reasonably regulate. The Court held (410 U.S. at p. 163, 93 S. Ct. at pp. 731-732, 35 L. Ed. 2d at pp. 182, 183):

> "With respect to the State's important and legitimate interest in the health of the mother, the 'compelling' point, in the light of present medical knowledge, is at approximately the end of the first trimester. * * * It follows that, from and after this point, a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health. Examples of permissible state regulation in this area are requirements as to the qualifications of the person who is to perform the abortion; as to the licensure of that person; as to the facility in which the procedure is to be performed, that is, whether it must be a hospital or may be a clinic or some other place of less-than-hospital status; as to the licensing of the facility; and the like."

Therefore, since the PMAP serves to regulate the elective decision of the pregnant woman and her doctor *throughout the three trimesters*, they are too broad and overreach the State's legitimate interest.

In the original Temporary Restraining Order, the relief that was granted was rather broad in nature. This was done in consideration of the fact that most of the Plaintiffs were in their first trimester of pregnancy; the few remaining Plaintiffs were not beyond their seventeenth week of pregnancy. These facts were considered along with the Affidavit of Douglass S. Thompson, an Associate

Professor of Obstetrics and Gynecology at the University of Pittsburgh School of Medicine, the Director of the Division of Community Health at Magee-Womens Hospital and the Medical Director, Ob-Gyn Medical Care Center of Magee-Womens Hospital. In his Affidavit he stated that:

> "It is the practice of all physicians associated with Magee-Womens Hospital to schedule abortions within the first eleven weeks of pregnancy if possible."
>
> * * * * * * *
>
> "Magee-Womens Hospital will not provide abortions to women who are more than twenty weeks pregnant without special permission for extremely unusual cases."

As for the accompanying Order, we intend to require payment by the PMAP for only elective abortions where the mother is *in* the first trimester of her pregnancy and *not* beyond the twelfth week of said pregnancy. The plaintiffs in their "Prayer for Relief" sought *inter alia:*

> "This Court preliminarily and permanently enjoin defendants from refusing to pay the reasonable costs of abortion services prescribed by a qualified physician and provided to women eligible for Medical Assistance."

After carefully scrutinizing the Regulations of PMAP and after reaching the conclusions that these Regulations do impinge on a fundamental right in the first trimester, the relief sought must be limited to that particular part of the pregnancy.

Pennsylvania has further contended that the PMAP cover only *necessary* medical services because of a need

to conserve hospital space and State funds. We believe, however, that the Supreme Court in *Roe v. Wade, supra*, recognized that abortion is a necessary medical service for it may prevent specific and direct harm which is medically diagnosable (e.g. psychological harm), may protect the woman's future mental and physical health, and may prevent the distress associated with the unwanted pregnancy and child, (410 U.S. at p. 153, 93 S. Ct. at 727, 35 L. Ed. 2d at 177). Furthermore, every pregnant woman requires medical services in connection with her pregnancy. The expense of these services, the need for the use of more extensive hospital facilities, and the risk to the woman's health all increase as the pregnancy advances toward term. The State's classification of what is medically necessary must have some reasonable relation to the rationale behind the classification, and the non-therapeutic abortion, in the light of the *Roe* decision, cannot be validly classified as unnecessary.

As was stated by the District Court in *Klein v. Nassau County Medical Center, supra* (347 F. Supp. at p. 500):

> "* * * Pregnancy is a condition which in today's society is universally treated as requiring medical care, prenatal, obstetrical and post-partum care, and undeniably it is provided under the Medicaid program as 'necessary' medical assistance although pregnancy is not an abnormal condition, nor does the medical assistance in childbirth 'cure' it. Medical assistance for abortion is not less 'necessary' because an election to bear the child would obviate that medical assistance and require instead other, more extensive and more expensive medical assistance. The pregnant woman, may not be denied necessary medical assistance because she has made an unwarrantedly disfavored choice, and no other basis appears here for denying Medical Assistance. *Eisenstadt v. Baird*, 1972, 405 U.S. 438, 452-453, 92 S. Ct. 1029, 31 L. Ed. 2d 349. State law articulates no policy that authorizes disfavoring one choice, and none other than the invalid argument based on the word 'necessary' is advanced."

It cannot be argued at this time that the justification for denying benefits to indigent women, who wish to terminate their pregnancies by abortion, is to discourage abortion. It is noted that the PMAP, by limiting Medical Assistance reimbursement of abortion costs does not distinguish between married pregnant women and unmarried pregnant women. In *Roe v. Wade, supra*, the Court suggested that discouraging illicit sexual conduct is not a serious argument for justifying restrictions on abortions; nor would there be any such nexus here. In *Doe v. Rampton*, 366 F. Supp. 189 (D.C. Utah 1973), a District Court held unconstitutional a Utah limitation on medical assistance coverage to therapeutic abortions ruling that the Plaintiff "would be denied equal protection of the law if the defendant, his agents and employees are permitted to discriminate between 'therapeutic' and 'non-therapeutic' abortions in the administration of the Medicaid Program." See also *Comment, Abortion on Demand in Post-Wade Context: Must the State Pay the Bills?* 41 Fordham Law Review 921 (1973). We hold that the State's decision to limit coverage to "medically indicated" abortions, as arbitrarily determined by it, is a limitation which promotes no valid State interest. In the PMAP, the State has instituted a program to provide benefits to the poor; the State has excluded certain of the poor from the program; the exclusion denies Medical Assistance benefits to other-

wise eligible applicants solely because they have elected to have an abortion, and the State has been unable to show that the exclusion of such persons promotes a compelling State interest. *Shapiro v. Thompson, supra.*

In *Hathaway v. Worcester City Hospital,* 475 F. 2d 701 (1st Cir. 1973), the Court stated as follows (at pp. 705, 706):

> "But it seems clear, after *Roe* and *Doe,* that a fundamental interest is involved, requiring a compelling rationale to justify permitting some hospital surgical procedures and banning [the hospital here had a policy of barring use of facilities for sterilization operations] another involving no greater risk or demand on staff and facilities. While *Roe* and *Doe* dealt with a woman's decision whether or not to terminate a particular pregnancy, a decision to terminate the possibility of any future pregnancy would seem to embrace all of the factors deemed important by the Court in *Roe* in finding a fundamental interest. 410 U.S. at 155, 93 S. Ct. 705, but in magnified form, particularly so in this case given the demonstrated danger to appellant's life and the eight existing children."
>
> * * * * * * *
>
> "We are merely saying, consistent with the Supreme Court's reasoning in *Shapiro* with regard to welfare payments, that once the state has undertaken to provide general short-term hospital care, as here, it may not constitutionally draw the line at medically indistinguishable surgical procedures that impinge on fundamental rights."

For the aforementioned reasons, we conclude that the Regulations and/or Procedures of the Pennsylvania Medical Assistance Program are unconstitutional because they are in violation of the Equal Protection Clause since they create an unlawful distinction between indigent women who choose to carry their pregnancies to birth, and indigent women who choose to terminate their pregnancies by abortion.

We further conclude that the State may not, by means of any statutes, regulations or procedures similar to those comprising the Pennsylvania Medical Assistance Program, unlawfully impinge upon the fundamental rights of any pregnant woman during the first three months or trimester of her pregnancy.

We do not here decide, as the Dissent would indicate, that the Commonwealth of Pennsylvania is constitutionally unable to limit its expenditures for medical services to those which are medically necessary simply because we hold that payments must be made for "elective" abortions. Rather we hold that the Commonwealth has already determined that the condition of pregnancy brings about the necessity of medical services. The Commonwealth cannot then discriminate with respect to the methods of treatment for that condition, for in the first trimester of pregnancy, *Roe v. Wade, supra,* the selection of the method of treatment is the inviolable fundamental right of the physician and the patient.

It could not be controverted that if the Commonwealth adopted a regulation denying payment for medical services for the birth of an illegitimate child and, at the same time, provided payment for medical services for an abortion to prevent such a birth—such a regulation, which

is but the other side of the same coin, would clearly be an unconstitutional discrimination. It is, therefore, the meaning of this Opinion that the Commonwealth has invidiously discriminated among persons equally eligible for assistance against those who seek medical treatment within the confines of a fundamental right.

As agreed by the Dissent, we are not to determine the presence or absence of a compelling State interest in the first trimester of pregnancy—the Supreme Court of the United States has eliminated this problem in declaring the fundamental right of the physician and patient as being paramount to the interest of the State. We do not hold that the State must finance a fundamental right, but we do hold that the expression of that fundamental right cannot be the basis for invidious discrimination.

An appropriate order will be entered.

ORDER

AND NOW, to-wit, this 3rd day of May, 1974, this Court declines to certify the Plaintiffs as representatives of a class for the reasons stated in the accompanying Opinion, and

Inasmuch as the requests of the original Temporary Restraining Order have been fulfilled, it is not necessary to take any further action with respect thereto; and any further action by this Court will be held in abeyance pending specific requests pursuant to this Opinion.

DANIEL J. SNYDER, JR.
United States District Judge
HERBERT P. SORG
United States District Judge

CC:

Stephen D. Tompkins, Esq., 9 North Park Row, Erie, Pennsylvania 16501

R. Stanton Wettick, Jr., Esq., 310 Plaza Building, Pittsburgh, Pa. 15219

Louis Kwall, Esq., 1402 State Office Building, Pittsburgh, Pa. 15222

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 73-846

Ann Doe; Betty Doe, etc., et al., each individually and on behalf of all other women similarly situated,
Plaintiffs

v.

Helen Wohlgemuth, individually and as Secretary of the Department of Public Welfare, Commonwealth of Pennsylvania, et al.,
Defendants

WEIS, *Circuit Judge*, dissenting:

As I view it, the effect of the majority opinion is that the Commonwealth of Pennsylvania is constitutionally unable to limit its expenditures for medical services to those which are medically necessary. I do not agree and respectfully dissent.[1]

Preliminarily, it must be understood that we are not to determine if the qualified right to obtain an abortion is a fundamental constitutional right. That question has

[1] I agree that under Super Tire Engineering Co. v. McCorkle, U.S. , 42 U.S.L.W. 4507 (April 16, 1974), the plaintiffs have standing. I also concur in the court's finding that the State regulations are not in conflict with the federal statute.

been foreclosed by the United States Supreme Court decision in *Roe v. Wade*, 410 U.S. 113 (1973). Its invocation here obscures the basic issue—is the State required to pay for an elective, nonmedically necessary abortion when it does not fund other medically non-necessary services.

Insofar as the factual background is concerned, it was made clear at oral argument that the basic issue in this case centers around "elective" abortions, that is, those situations where there is no evidence of harm to the life or to the physical or emotional health of the mother. If those factors were involved, then Pennsylvania would pay for the necessary services and that matter is not at issue here.[2] Therefore, the point that I address is the situation where there is no threat to the life or health of the mother and the election of an abortion is purely because of personal preference.[3] Thus, the question here is not whether the State may prohibit certain categories of abortions by statute or practice. It does not do so. The issue is whether the Constitution has thrust upon Pennsylvania an affirmative burden to pay for an elective abortion because the legislature has decided that the State will pay for those abortions for the indigent arising from medical necessity. My conclusion is in the negative because there is no constitutional requirement that the State must finance the exercise of a "fundamental" right, nor does a classification which distinguishes between medically necessary and

[2] The Commonwealth asserts that it does pay the fees of physicians to perform the preliminary examination and the contentions of the plaintiffs to the contrary appear to be in error.

[3] There is no question that the issue does not arise as to the second or third trimester because of the Roe v. Wade, *supra*, decision limiting its thrust to the first trimester.

non-necessary abortions offend the Equal Protection Clause.

That the State has an affirmative duty to pay for the implementation of fundamental rights is, with certain narrowly carved exceptions, contrary to the weight of constitutional authority. The unusual situation may be typified by *Griffin v. Illinois*, 351 U.S. 12 (1956), requiring that an indigent criminal defendant be furnished with transcripts at State expense. In an analogous situation, *Boddie v. Connecticut*, 401 U.S. 371 (1971), held that an indigent could not be barred from securing a divorce because of inability to pay State assessed filing fees. To be precise, the State was not required to pay the fees but to forego collecting them.[4] The common element to these cases in this carefully limited category is a State "monopoly" on the effective forum, *i.e.*, the courts. It is crucial here that the State has no monopoly on performing abortions and in fact is not in the business to any degree. It is only the money from the State which is at issue and the absence of State funds, on this record, will not absolutely prevent the plaintiffs from obtaining the services which they desire.[5] It is important, also, in keeping

[4] The later cases of U.S. v. Kras, 409 U.S. 434 (1973), and Ortwein v. Schwab, 410 U.S. 656 (1973), indicate that this principle would not be extended to cover such matters as bankruptcy and state appellate court filing fees in civil cases. Note the distinction between requiring the state to pay out money, as in the transcript cases, as compared to the situation where the state has imposed a monetary obstacle, *e.g.*, filing fee. Similarly, one must recognize that there may be a difference between cases arising under the due process clause and those based on equal protection.

[5] It may be assumed that various non-profit organizations interested in advancing their point of view of the desirability of abortions on demand realistically could be expected to give financial assistance if approached. While it has been urged that the existence of private charitable funds should not enter into consideration of cases involving welfare rights, for example, it is an element which points out that payment of monies, not the exercise of fundamental rights, is the point of issue here.

this case in perspective to realize that there is nothing other than its own desire to be recompensed which prevented the Magee-Womens Hospital from performing these procedures. The State created no obstacle, the hospital did. State money may make it easier and more convenient to obtain an abortion but that is not a legitimate basis for creating a constitutional mandate.

With the exception of the narrow area referred to, it is clear that there is no constitutional requirement that a State must fund fundamental rights. A scrutiny of representative Supreme Court determinations on the "fundamental" right classification, including those in the right of privacy category, demonstrates no corollary of required State subsidy.

While *Shapiro v. Thompson*, 394 U.S. 618 (1969),[6] found the right to travel among the states to be fundamental, no suggestion has been made that transportation charges for the indigent must be paid by the State.

[6] Shapiro found a residency requirement invalid when it prevented a welfare recipient from receiving payments needed for "the very means to subsist—food, shelter, and other necessities of life," 394 U.S. at 627. Memorial Hospital v. Maricopa County, U.S. , 42 U.S.L.W. 4277 (February 26, 1974), similarly struck down residency requirements when used to deny medical care which was *necessary* for the preservation of health. But in Vlandis v. Kline, 412 U.S. 441 (1973), a residency requirement affecting the amount of tuition to be paid at a State university was not found to be a per se restriction on the right to travel.

While a person may have a fundamental right of privacy to have obsene material in his home, *Stanley v. Georgia,* 394 U.S. 557 (1969), there have been no serious contentions that the State must furnish such material for the indigent. The fundamental rights of freedom of speech and of the press impose no duty on the State to purchase public address systems or printing presses for those unable to pay for them.

I have elaborated perhaps more than necessary the point that although a right may be classified as "fundamental," there is no inherent requirement that there be financial implementation by the State. The principle is important here because it is only when a fundamental right is sought to be regulated or restricted that the State must show a compelling interest to justify its action. In applying such a standard to a purely funding situation, I believe the majority errs.[7]

Absent a fundamental constitutional right basis, the plaintiffs' claim of denial of equal protection must necessarily be analyzed within the less restrictive requirement of a rational relationship to a legitimate governmental in-

[7] *See* page 33. Similarly, Hathaway v. Worcester City Hospital, 475 F. 2d 701 (1st Cir. 1973), is distinguishable because funding was not the issue. Roe v. Rampton, 366 F. Supp. 189 (D. Utah 1973), did not meet the issue involved here. In that case the State refused to pay for all abortions.

Cleveland Board of Education v. LaFleur, U.S. , 42 U.S. L.W. 4186 (January 21, 1974), was decided on the basis of due process and the use of irrebuttable presumptions to penalize a fundamental right. There the plaintiffs were deprived of wages and employment opportunities because of their decision to bear a child. Here, the plaintiffs are not being deprived of welfare rights or of income because of their decision to have an abortion.

terest. *Jefferson v. Hackney,* 406 U.S. 535 (1971), *Richardson v. Belcher,* 404 U.S. 78 (1971), *Dandridge v. Williams,* 397 U.S. 471 (1970).

Simply stated, it is Pennsylvania's position that it will fund only medically necessary procedures for the poor. The State has not chosen to provide a plan of total, comprehensive, all encompassing medical care for those who meet the indigency requirements.[8] It does not aim to provide such services as may be "elective" or merely desired. While a financial basis for such a broad policy is obvious, another consideration may be the additional strain on limited medical facilities and resources. Nor can we ignore the difficult legislative judgment as to where to draw the line so that the medical services furnished without charge to the indigent are not so grossly disproportionate to those which may be available to those who, while not indigent, have little money to pay for necessary care, let alone electives, after paying for the absolute necessities of life.[9]

[8] "The Department of Public Welfare pays for those types of medical and allied services given in the home, office, clinic, or hospital, that are recognized as necessary treatment of illness."
• • • • • • • • •

"There is no intention to pay for extravagant or superfluous medical care, or care that would be beyond the means of the average family of moderate income." Section 9100(E)(1) Department of Public Welfare Pennsylvania Manual.

[9] In this context, we find the comment of Justiee Powell, although dealing with education, most apt:

"The ultimate wisdom as to these and related problems is not likely to be devined for all time even by the scholars who now so earnestly debate the issues. In such circumstances the judiciary is well advised to refrain from interposing, on the States inflexible constitutional restraints that could circumscribe or handicap the

Having once established a valid basis for its general policy, *e.g.*, payment for only necessary medical expenses, the State does not violate the Equal Protection Clause if the classification is imperfect, lacks mathematical exactness, or in practice may result in some inequities. *Jefferson v. Hackney, supra, Dandridge v. Williams, supra.*

While the plaintiffs contend that elective abortions are ultimately less costly than prenatal, delivery, and postnatal services, I do not find this monetary argument convincing. It may be argued just as forcefully that from the financial standpoint allowing the child to be born will produce a tax paying citizen whose contribution to the State in his lifetime will exceed many times his cost of delivery.

A conspicuous example of the limited scope of the State's funding of medical services for the indigent is the refusal to pay for elective cosmetic surgery.[10] No one contends that this practice offends the Equal Protection Clause even though such services have been paid by the State in some instances when found to be medically necessary.

Surely, no one can argue seriously that in view of the holding that the right to have an abortion has been found to be a fundamental one, the right to receive plastic surgery is not equally so. There can be no doubt that an attempt by a State to impose criminal sanctions upon those seeking or administering such procedures would be struck

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continued research and experimentation so vital to finding even partial solutions . . . and to keeping abreast of ever changing conditions." San Antonio School District v. Rodriguez, 411 U.S. 1. 43 (1973).

[10] Section 9411.213, D.P.W.—Pa. Manual.

down as unconstitutional. And yet that consideration does not transform what is an elective into a medically necessary operation. The majority's reasoning that dictum in *Roe v. Wade, supra,* makes all abortions, elective or not, into medically necessary ones is logically and factually erroneous.

In the usual equal protection case the State is presumed to have acted within its constitutional powers, even though in practice some inequality may have resulted. *Lindsey v. Normet,* 405 U.S. 56 (1971). A statutory discrimination may not be invalidated if any set of facts may reasonably be conceived to justify it. *McGowan v. Maryland,* 360 U.S. 420 (1960). It is not every classification but only an invidious one that runs afoul of the Equal Protection Clause. *Jefferson v. Hackney, supra.*

A classification based on whether a procedure is medically necessary or unnecessary is not invidious. I dissent.

JOSEPH R. WEIS, J
Circuit Judge

Dated: May 3, 1974

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 73-846

Ann Doe; Betty Doe, a minor, by her mother as representative, Mother B. Doe; Cathy Doe; Donna Doe, a minor by her mother as representative, Mother D. Doe; Elaine Doe; Jane Doe, a minor, by her father as representative Father J. Doe; Nancy Doe; Patricia Doe; Ruth Doe; Sylvia Doe; and Toni Doe, each individually and on behalf of all other women similarly situated,

Plaintiffs,

vs.

Helene Wohlgemuth, individually and as Secretary of the Department of Public Welfare, Commonwealth of Pennsylvania; Roger Cutt, individually and as Assistant Deputy Secretary for Medical Services, Commonwealth of Pennsylvania; Glenn Johnson, individually and as Chief of the Bureau of Medicial Assistance, Commonwealth of Pennsylvania; Edward Kalberer, individually and as Executive Director of the Allegheny County Board of Assistance; and the Department of Public Welfare, of the Commonwealth of Pennsylvania,

Defendants.

SUPPLEMENTAL ORDER

AND NOW, to-wit, this 28th day of May, 1974, the Plaintiffs having submitted specific Requests for Judgment, and upon due consideration thereof, IT IS HEREBY ADJUDGED AND DECREED that the Regulations and Procedures of the Department of Public Welfare of the Commonwealth of Pennsylvania, as they apply to reimbursement for abortions performed within the first twelve (12) weeks of pregnancy, are unconstitutional. In all other respects, Plaintiffs' Requests for Declaratory Judgment are denied.

IT IS FURTHER ADJUDGED AND DECREED that the Plaintiffs' Requests for Injunctive Relief are denied.

DANIEL J. SNYDER, JR
United States District Judge
HERBERT P. SORG
United States District Judge

CC:

R. Stanton Wettick, Jr., Esquire, 310 Plaza Building, Pittsburgh, Pa. 15219

Louis Kwall, Esquire, Office of the Attorney General, 1402 State Office Building, Pittsburgh, Pa. 15222.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 74-1726 and 74-1727

Ann Doe; Betty Doe, a minor, by her mother as representative, Mother B. Doe; [Cathy Doe; Donna Doe,] a minor, by her mother as representative, Mother D. Doe; Elaine Doe, Jane Doe, a minor by her father as representative Father J. Doe; Nancy Doe; Patricia Doe; Ruth Doe; Sylvia Doe; and Toni Doe, each individually and on behalf of all other women similarly situated,

Appellees and Cross-Appellants,

v.

Helene Wohlgemuth, individually and as Secretary of the Department of Public Welfare, Commonwealth of Pennsylvania; Roger Cutt, individually and as Assistant Deputy Secretary for Medical Services, Commonwealth of Pennsylvania; Glenn Johnson, individually and as Chief of the Bureau of Medical Assistance, Commonwealth of Pennsylvania; Edward Kalberer, individually and as Executive Director of the Allegheny County Board of Assistance; and the Department of Public Welfare, of the Commonwealth of Pennsylvania,

Appellants and Cross-Appellees.

D. C. Civil No. 73-846

Appeal From the United States District Court for the Western District of Pennsylvania

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Argued October 24, 1974

Before Kalodner, Van Dusen and Gibbons,
Circuit Judges

Norman J. Watkins, Deputy Attorney General
Robert F. Nagel, Deputy Attorney General
Israel Packel, Attorney General
Pennsylvania Department of Justice
Capitol Annex, Harrisburg, Pennsylvania 17120
Attorneys for Appellants & Cross-Appellees

R. Stanton Wettick, Jr., Esq.
Judd F. Crosby, Jr., Esq.
Pittsburgh, Pennsylvania 15219
Attorneys for Appellees & Cross-Appellants

OPINION OF THE COURT
(Filed Dec 10, 1974)

KALODNER, *Circuit Judge.*

These cross-appeals are from the "Supplemental Order" of the three-judge District Court[1] which adjudged unconstitutional Regulations and/or Procedures ("Pro-

[1] Weis, Circuit Judge, and Sorg and Snyder, District Judges.

cedures") of the Pennsylvania Medical Assistance Program ("PMAP") insofar as they pertain to reimbursement to welfare recipients for abortions performed within the first trimester of pregnancy, but denied declaratory relief as to abortions performed during the second trimester of pregnancy, and an application for injunctive relief.

The "Supplemental Order" was entered pursuant to the District Court's opinion[2] which held that the Procedures violate the equal protection clause of the Fourteenth Amendment in that their limitation of coverage to "medically indicated" abortions "is a limitation which promotes no valid State interest."[3] The opinion further held that the Procedures did not conflict with the requirements of Title XIX of the Social Security Act, 42 U.S.C.A. §1396 et seq.

The defendant-representatives of the Commonwealth of Pennsylvania have appealed the District Court's "Supplemental Order" and the plaintiff-welfare recipients have appealed from the denial of declaratory relief as to abortions performed during the second trimester of pregnancy.

The District Court's dispositions were made in an action filed by the plaintiffs-welfare recipients and participants in the PMAP challenging the Procedures which provide that abortions may be performed under the PMAP only in the following situations:

> "1. There is documented medical evidence that continuance of the pregnancy may threaten the health or life of the mother;

[2] The District Court's opinion, Judge Weis, dissenting, is reported at 376 F. Supp. 173 (W.D. Pa. 1974).

[3] 376 F. Supp. at 191.

> "2. There is documented medical evidence that the infant may be born with incapacitating physical deformity or mental deficiency; or
>
> "3. There is documented medical evidence that a continuance of a pregnancy resulting from legally established statutory or forcible rape or incest, may constitute a threat to the mental or physical health of a patient;
>
> "4. Two other physicians chosen because of their recognized professional competency have examined the patient and have concurred in writing; and
>
> "5. The procedure is performed in a hospital accredited by the Joint Commission on Accreditation of hospitals." 376 F. Supp. at 175.

The "Supplemental Order" of the District Court was entered May 28, 1974, and these cross-appeals were argued to this Court on October 28, 1974.

It now appears that on September 18, 1974, the Attorney General of Pennsylvania filed a Stipulation in a pending independent action which declares that the Procedures here involved "have not been applied . . . when litigation is threatened," since July 8, 1974.

The Stipulation was filed in *Doe v. Wohlgemuth*, Civil Action No. 73-1564, United States District Court for the Eastern District of Pennsylvania,[4] where welfare recipients have presented challenges raised in the instant case with respect to the Procedures and applied for declaratory and injunctive relief.

[4] The action was instituted July 12, 1974, and a three-judge court was convened on September 18, 1974 pursuant to the provisions of 28 U.S.C.A. §§2281 and 2284.

The Stipulation provides in relevant part as follows:

"In response to this Court's Order of July 19, 1974, the parties to this action hereby stipulate as follows:

"(1) The policy and practice challenged in this action is presently being applied on a uniform state-wide basis *except* as appears in paragraph (2) below.

"(2) a) *From on or about July 8, 1974, Defendants' Medicaid abortion policies have not been applied in any county in Pennsylvania when litigation is threatened by any eligible person seeking an abortion* and it appears to Defendants' counsel that a failure to reimburse for that abortion would result in repetitious litigation that would end in a court order granting preliminary relief against the Commonwealth. . . ." (emphasis supplied).

The inescapable import of the Stipulation of which we take judicial notice,[5] is that the Procedures are enforced *only* against welfare recipients who do not threaten suit.

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[5] It is settled that this court may take judicial notice of developments since the taking of an appeal when they are relevant, and that we may further take judicial notice of pleadings in another case, especially where it presents a related issue. Landy v. Federal Deposit Insurance Corporation, 486 F.2d 139 (3d Cir. 1973), *cert. denied*, 416 U.S. 960 (1974); Bryant v. Carleson, 444 F.2d 353 (9th Cir. 1970), *cert. denied*, 404 U.S. 967; Kalimian v. Liberty Mutual Life Insurance Company, 300 F.2d 547 (2d Cir. 1962); Funk v. Commissioner of Internal Revenue Service, 163 F.2d 796 (3d Cir. 1947); Zahn v. Transamerica Corporation, 162 F.2d 36 (3d Cir. 1947).

The Pennsylvania Department of Welfare and its Secretary, defendants here, are also defendants in Doe v. Wohlgemuth, Civil Action No. 73-1564 (E.D. Pa.).

The sum total of the existing situation with respect to the Procedures is that they are enforced as to some welfare recipients and denied as to others.

Standing alone, and independently so, the stated circumstances constitute violation of the equal protection clause of the Fourteenth Amendment. That being so, we do not reach the holding of the court below that the Procedures *per se* violate the Fourteenth Amendment. Assuming *arguendo,* that the Procedures are constitutional and consistent with the Social Security Act, it is long settled that State administrative procedures which are *per se* valid and constitutional may nevertheless be enjoined when they are unconstitutionally applied. *Yick Wo v. Hopkins,* 118 U.S. 356, 6 S. Ct. 1064, 30 L. Ed. 220 (1886).[6]

For the reasons stated, the "Supplemental Order" of the District Court will be vacated and the cause remanded to the District Court with directions to enter an order enjoining enforcement of the Pennsylvania abortion Procedures in accordance with this opinion.

To the Clerk of the Court:

Please file the foregoing opinion.

United States Circuit Judge

VAN DUSEN, *Circuit Judge,* concurring:

While I join in the judgment of the court and in Judge Kalodner's opinion, I also agree with the district court

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[6] The Supreme Court has stressed that "a law nondiscriminatory on its face may be grossly discriminatory in its operation." Williams v. United States, 399 U.S. 235, 242 (1970); Griffin v. Illinois, 351 U.S. 12 at page 17, n.11 (1956).

majority opinion that the Procedures violate the Constitution for the reasons stated in that opinion. See *Doe v. Wohlgemuth*, 376 F. Supp. 173, 190-92 (W. D. Pa. 1974).

UNITED STATES COURT OF APPEALS
For the Third Circuit

Nos. 74-1726/74-1727

Ann Doe; Betty Doe, a minor, by her mother as representative, Mother B. Doe; [Cathy Doe; Donna Doe,] a minor, by her mother as representative, Mother D. Doe; Elaine Doe; Jane Doe, a minor by her father as representative Father J. Doe; Nancy Doe; Patricia Doe; Ruth Doe; Sylvia Doe; and Toni Doe, each individually and on behalf of all other women similarly situated,

Appellants in No. 74-1727

vs.

Helene Wohlgemuth, individually and as Secretary of the Department of Public Welfare, Commonwealth of Pennsylvania; Roger Cutt, individually and as Assistant Deputy Secretary for Medical Services, Commonwealth of Pennsylvania; Glenn Johnson, individually and as Chief of the Bureau of Medical Assistance, Commonwealth of Pennsylvania; Edward Kalberer, individually and as Executive Director of the Allegheny County Board of Assistance; and the Department of Public Welfare of the Commonwealth of Pennsylvania,

Appellants in No. 74-1726

(D.C. Civil Action No. 73-846)

On Appeal From the United States District Court
for the Western District of Pennsylvania

Present: Kalodner, Van Dusen and Gibbons, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed May 28, 1974, be, and the same is hereby vacated, and the cause is remanded to the District Court with directions to enter an order enjoining enforcement of the Pennsylvania abortion Procedures in accordance with the opinion of this Court.

Attest:

THOMAS P. QUINN
Clerk

December 10, 1974

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 74-1726 and 74-1727

Ann Doe; Betty Doe, a minor by her mother as representative, Mother B. Doe; [Cathy Doe; Donna Doe,] a minor, by her mother as representative, Mother D. Doe; Elaine Doe; Jane Doe, a minor by her father as representative Father J. Doe; Nancy Doe; Patricia Doe; Ruth Doe; Sylvia Doe; and Toni Doe, each individually and on behalf of all other women similarly situated,

Appellants in No. 74-1727

vs.

Frank S. Beal, individually and as Secretary of the Department of Public Welfare, Commonwealth of Pennsylvania; Roger Cutt, individually and as Assistant Deputy Secretary for Medical Services, Commonwealth of Pennsylvania; Glenn Johnson, individually and as Chief of the Bureau of Medical Assistance, Commonwealth of Pennsylvania; James A. Dorsey, Jr., individually and as Executive Director of the Allegheny County Board of Assistance; and the Department of Public Welfare of the Commonwealth of Pennsylvania

Appellants in No. 74-1726

(D. C. Civil No. 73-846)

Appeal From the United States District Court for the Western District of Pennsylvania

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Argued October 24, 1974

Before Kalodner, Van Dusen and Gibbons, *Circuit Judges*
Reargued en banc May 8, 1975

Before Seitz, *Chief Judge*, and Kalodner, Van Dusen, Aldisert, Adams, Gibbons, Rosenn, Hunter and Garth, *Circuit Judges*.

Norman J. Watkins, Deputy Attorney General;
Robert F. Nagel, Deputy Attorney General;
Israel Packel, Attorney General;
Harrisburg, Pa.
Attorneys for Appellants in No. 74-1726

R. Stanton Wettick, Jr., Esq. and Judd F. Crosby, Jr., Esq., Pittsburgh, Pa.,
Attorneys for Appellants in No. 74-1727

Nancy M. Weinman, Esq., for MacCoy, Evans & Lewis, Philadelphia, Pa.,

On the Brief:

Sylvia A. Law, Esqs., New York, N.Y.

Harriet Katz, Esq., Philadelphia, Pa.
Attorneys for Contributors to Pennsylvania Hospital, Amicus Curiae

OPINION OF THE COURT
(Filed Jul 21, 1975)

VAN DUSEN, *Circuit Judge.*

Before us are appeals both by plaintiffs and by the defendants from an order of a three-judge district court entered May 28, 1974, pursuant to an opinion which was filed by the district court on May 3, 1974. *Doe v. Wohlgemuth,* 376 F. Supp. 173 (W. D. Pa. 1974).[1] The case was argued before a panel of this court on October 24, 1974. The panel's opinion and judgment were filed on December 10, 1974. On December 24, 1974, the plaintiffs (appellees and cross-appellants) petitioned the court to rehear the case en banc. On January 31, 1975, we vacated the panel's December 10, 1974, judgment and ordered the case to be reheard en banc. The case was reargued en banc on May 8, 1975.

I. BACKGROUND

The facts appear in the district court's opinion. *Doe v. Wohlgemuth, supra* at 175-78. Briefly stated, the plaintiffs are women who are eligible for benefits under the Pennsylvania Medical Assistance Program (PMAP).[2]

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[1] The plaintiffs sought both injunctive and declaratory relief. The district court granted a declaratory judgment for plaintiffs, but denied injunctive relief. Since the plaintiffs have not appealed the district court's denial of injunctive relief, this court has appellate jurisdiction. *Mitchell v. Donovan,* 398 U. S. 427 (1970); 28 U. S. C. §§1253, 1291. The caption was changed to *Doe v. Beal,* pursuant to F. R. Civ. P. 25(a)(1), after the appeal had been docketed in this court.

[2] See note 16 below for further description of the named plaintiffs. The district court declined to certify the plaintiffs as

The defendants are "the Pennsylvania Department of Public Welfare (Department) and certain of its Officers and/or Administrative Representatives." *Id.* at 175. The plaintiffs challenge certain procedural requirements (hereinafter referred to as "procedures" or "regulations") which the Department has adopted to restrict PMAP payments for abortions.[3] The district court found that, under these procedures, abortions would only be performed under PMAP in the following situations:

> "'1. There is documented medical evidence that continuance of the pregnancy may threaten the health or life of the mother;

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representatives of a class. *Doe v. Wohlgemuth, supra* at 181-82. The plaintiffs have not appealed the refusal to grant them class-action status.

[3] After the district court's order was entered in the case before us, the Commonwealth of Pennsylvania enacted an "Abortion Control Act," Act No. 209, Sess. of 1974, 35 P.S. §§6601 *et seq.* (Purdon's Pa. Legis. Serv. No. 4), effective date October 10, 1974. Like the regulations before us, but through rather different language, §7 of The Abortion Control Act restricted state subsidy of elective abortions. The enforcement of §7, together with certain other provisions of the same Act, was preliminarily enjoined by a three-judge district court in the Eastern District of Pennsylvania on October 10, 1974. *Planned Parenthood Ass'n of Southeastern Pa., Inc. v. Fitzpatrick,* Civ. No. 74-2440 (E.D. Pa., Oct. 10, 1974).

At oral argument, we asked counsel for the Commonwealth whether the Abortion Control Act had superseded the regulations at issue in this suit. He represented that the Act had not, and that the Commonwealth intended to enforce the regulations independently of the fate of the Abortion Control Act. For this reason, we have concluded that this suit has not been mooted by passage of the Abortion Control Act. *Cf. Abele v. Markle,* 369 F. Supp. 807, 809 (D. Conn. 1973).

2. There is documented medical evidence that the infant may be born with incapacitating physical deformity or mental deficiency; or

3. There is documented medical evidence that a continuance of a pregnancy resulting from legally established statutory or forcible rape or incest, may constitute a threat to the mental or physical health of a patient;

4. Two other physicians chosen because of their recognized professional competency have examined the patient and have concurred in writing; and

5. The procedure is performed in a hospital accredited by the Joint Commission on Accreditation of Hospitals.' "

Id. at 175. See also *id.* at 175 n.1.[4] In effect, these requirements define a compensable "therapeutic" abortion, and exclude payment for non-therapeutic, or "elective," abortions. The district court found that PMAP also covers the costs of prenatal care, childbirth, and post-partum treatment when the women chooses to bear the child. *Id.* at 187.

The plaintiffs attack the Department's regulations both on the statutory ground that they are inconsistent with Title XIX (commonly called "Medicaid") of the Social Security Act (hereinafter sometimes referred to as

[4] 62 P.S. §403 (1968) empowers the Department to establish "regulations, rules, and standards" as to the eligibility for assistance.

"the Act"), 42 U. S. C. A. §§1396, *et seq.* (1974),[5] and also on the constitutional ground that they are inconsistent with Equal Protection Clause of the Fourteenth Amendment. In *Hagans v. Lavine*, 415 U. S. 528 (1974), the Supreme Court reversed the dismissal of a suit which challenged certain New York regulations under the Aid to Families with Dependent Children (AFDC) provisions of the Social Security Act, 42 U. S. C. A. §§601, *et seq.* (1974). Like Medicaid, AFDC is a voluntary participation program. See *Hagans v. Lavine, supra* at 530 n.1. Like the plaintiffs in the case now before us, the plaintiffs in *Hagans v. Lavine* challenged the New York regulations both on the ground that they were inconsistent with the Act and also on the ground that they violated the Equal Protection Clause of the Constitution. *Id.* at 530-31. The Court held that the constitutional claim was sufficient to confer jurisdiction on the district court under 28 U. S. C. § 1343(3),[6] but required the district court on remand to consider the statutory claim first as a matter of pendant

[5] Where code sections are referred to in this opinion without accompanying title references, "42 U. S. C. A. § (1974)" will be implicit.

[6] The defendants in the case before us do not deny that the plaintiffs' constitutional arguments are sufficiently meritorious to confer jurisdiction on the district court under §1343(3). In view of the federal lower court decisions holding unconstitutional regulations similar to the Pennsylvania procedures now before this court, the constitutional "claim . . . [is] of sufficient substance to support federal jurisdiction [under 28 U. S. C. §1343(3)]." *Hagans v. Lavine, supra* at 536. See, *e. g., Wulff v. Singleton*, 508 F. 2d 1211 (8th Cir. 1974); *Doe v. Westby*, 383 F. Supp. 1143 (D. S. D. 1974), and cases cited therein at 1145, *vacated and remanded* for further consideration in light of *Hagans v. Lavine, supra*, 43 U. S. L. W. 3499 (U. S., Mar. 17, 1975).

jurisdiction. *Hagans v. Lavine, supra,* at 536, 539-43. The Supreme Court has recently made it clear that in the Title XIX setting it also desires the statutory claim to be carefully considered before constitutional questions are reached. In *Westby v. Doe,* 43 U. S. L. W. 3499 (U. S., Mar. 17, 1975), vacating *Doe v. Westby,* 383 F. Supp. 1143 (D. S. D. 1974), a policy of the Social Services Department of the State of South Dakota, which limited payment under Title XIX for abortions, was under review. The district court had reached the question of the policy's constitutionality without any consideration of the policy's consistency with Title XIX, and the Supreme Court summarily vacated and remanded for reconsideration in the light of *Hagans v. Lavine.*[7]

In the case before us, the district court considered the statutory claim, but decided that the Pennsylvania procedures were consistent with the Social Security Act. See *Doe v. Wohlgemuth, supra* at 182-86. Turning to the allegations of unconstitutionality, the court declared the procedures to be in violation of the Equal Protection Clause. See *id.* at 186-92.[8]

Both arguments are renewed in this appeal. Because we believe that the principle of *Hagans v. Lavine* applies

[7] The March 16, 1975, order of the Supreme Court (No. 74-684) reads, *inter alia,* as follows:

"The judgment is vacated and the case is remanded to the United States District Court for the District of South Dakota for further consideration in light of Hagans v. Lavine, 415 U. S. 528, 543-545 (1974)."

In *Doe v. Westby,* the district court's failure to address the statutory question may be explained by the parties' failure to raise it. See *Doe v. Westby, supra* at 1144.

[8] Circuit Judge Weis dissented. 376 F. Supp. at 192.

to the courts of appeals as well as to the district courts, we will consider first whether the Pennsylvania procedures are consistent with the Social Security Act. See *Alma Motor Co., v. Timkin-Detroit Axle Co.,* 329 U. S. 129, 136-37 (1947); *United States v. Schiavo,* 504 F. 2d 1, 6-7 & n.11 (3d Cir. 1974).

II. SUPREME COURT PRECEDENT ON THE SCOPE OF STATE PREROGATIVE UNDER THE SOCIAL SECURITY ACT

The district court reasoned that the Social Security Act was designed to give the states great latitude in establishing eligibility for, and levels of, benefits. *Doe v. Wohlgemuth, supra* at 184-86. The court relied principally on *Dandridge v. Williams,* 397 U. S. 471 (1970), in which the Supreme Court held that the Social Security Act allowed the states to place a ceiling on the amount of benefits available to recipients of AFDC. See also *New York Dept. of Social Services v. Dublino,* 413 U. S. 405 (1973) (a work incentive program added to the AFDC provisions of the Act does not pre-empt state work incentive programs); *Jefferson v. Hackney,* 406 U. S. 535 (1972) (Texas' method of computation of AFDC benefits held consistent with the Act).

The Supreme Court has recognized an important qualification to the *Dandridge v. Williams* principle. In *King v. Smith,* 392 U. S. 309 (1968), the Court held invalid Alabama regulations which prevented AFDC benefits from flowing to the children of women cohabiting out of wedlock. The Court found the regulations to be inconsistent with congressional policy regarding AFDC recip-

ients. Similarly, in *Rosado v. Wyman,* 397 U. S. 397 (1970), the Court held invalid a New York law which lowered the "standard of need" for AFDC benefits, finding the law to be inconsistent with what the Court "fathom-[ed] to be Congressional purpose" in enacting §402(a)(23) of the Social Security Act, 42 U. S. C. A. §602(a)(23) (1974). 397 U. S. at 414-15. *King* and *Rosado* demonstrate that, although the AFDC program is a "scheme of cooperative federalism," *King, supra* at 316, it is not a scheme of unlimited state discretion. Instead, Congress defined an area of state prerogative, the boundaries of which are defined by the congressional policies—both explicit and implicit[9]—found in the Social Security Act. The *King v. Smith* principle was reaffirmed by an eight-Justice majority in *Van Lare v. Hurley,* 43 U. S. L. W. 4592 (U. S., May 19, 1975) (finding New York's "lodger" regulations inconsistent with the Social Security Act). See also *Townsend v. Swank,* 404 U. S. 282 (1971); *Lewis v. Martin,* 397 U. S. 552 (1970).

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[9] In *Rosado*, the Court struck down the New York legislation, even though no express language in §402(a)(23) required that result:

> "These conclusions, if not compelled by the words of the statute or manifested by legislative history, represent the natural blend of the basic axiom—that courts should construe all legislative enactments to give them some meaning—with the compromise origins of §402(a)(23), set forth above." *Rosado, supra* at 415. See also *King v. Smith, supra* at 332 (relying on "[t]he pattern of this legislation," and "[t]he underlying policy and consistency in statutory interpretation").

III. TITLE XIX AS A "SCHEME OF COOPERATIVE FEDERALISM"

A. *Areas of state discretion*

Both parties agree with the district court that Title XIX, like AFDC, is a system of "cooperative federalism." *Doe v. Wohlgemuth, supra* at 184. The congressional desire to give the states considerable latitude in the administration of Title XIX is apparent throughout the statute. Funds are appropriated "[f]or the purpose of enabling each state, *as far as practicable under the conditions in such State,*" to furnish medical assistance and other services. 42 U. S. C. A. §1396 (1974) (emphasis added). The states are free to choose whether they will participate at all; a participating state's program can cover only the "categorically needy," §1396a(a)(10); 45 C. F. R. 249.10(a)(1) (Rev. Ed., Oct. 1, 1973); or it can be extended to include the "medically needy" as well. Section 1396a(a)(10)(C); 45 C. F. R. §249.10(a)(1).[10]

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[10] The phrases "categorically needy," referring to categories of recipients described in §1396a(a)(10)(A), and "medically needy," referring to recipients described in §1396a(a)(10)(C), appear in the Regulations. 45 C. F. R. §249.10(a)(1) (Rev. ed., Oct. 1, 1973). The categorically needy are persons receiving aid or assistance under Titles I, X, XVI, Part A of Title IV, and persons receiving supplemental income benefits under Title XVI. §1396a(a)(10)(A). The medically needy are persons who are not described in §1396a(a)(10)(A) "and who do not meet the income and resources requirements of the appropriate State plan, or the supplemental security income program under subchapter XVI of this chapter, as the case may be, as determined in accordance with standards prescribed by the Secretary—(i) for making medical assistance available to all individuals . . . who have insufficient

If a state extends coverage to the medically needy, it can either give the types of care and services listed in clauses (1) through (5) of §1396d(a) or give any seven of the types of care and services described in clauses (1) through (16) of §1396d(a).[11] Section 1396a(a)(13)(C). The statute literally abounds with other options which are open

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income and resources to meet the costs of necessary medical and remedial care and service. . . ." §1396a(a)(10)(C).

Pennsylvania provides services to the "medically needy." 62 P.S. §441.1 reads as follows:

> "The following persons shall be eligible for medical assistance:
>
> "(1) Persons who receive or are eligible to receive cash assistance grants under this article;
>
> "(2) Persons who meet the eligibility requirements of this article for cash assistance grants except for citizenship durational residence and any eligibility condition or other requirement for cash assistance which is prohibited under Title XIX of the Federal Social Security Act; and
>
> "(3) The medically needy."

This last phrase is not otherwise defined, except by 62 P.S. §442.1:

> "A person shall be considered medically needy if he:
>
> "(1) Resides in Pennsylvania, regardless of the duration of his residence or his absence therefrom; and
>
> "(2) Meets the standards of financial eligibility established by the department with the approval of the Governor. In establishing these standards, the department shall take into account (i) the funds certified by the Budget Secretary as available for medical assistance for the medically needy; (ii) pertinent Federal legislation and regulations; and (iii) the cost of living."

[11] PMAP extends coverage to the medically needy, giving them services (1) through (5), the same care and services as it is required to give the categorically needy. *Doe v. Wohlgemuth, supra* at 182-83.

to the participating states, all of which should help to tailor the state's program to the needs and conditions in that state, as contemplated in the appropriations section quoted above.

B. *Explicit statutory limitations on state discretion*

The story does not end with the litany of state discretion in A above. Many other provisions of the statute are designed to channel the state's program in directions which are consistent with the basic congressional objective of furnishing "medical assistance on behalf of families . . . whose income and resources are insufficient to meet the costs of necessary medical services." §1396.

1. Required services

Although the states were given a choice of services to provide to the medically needy, Congress requires the participating states to provide services (1) through (5) in §1396d(a) to the categorically needy. §1396a(a)(13)(B). Those services are the following:

> "(1) Inpatient hospital services; (2) outpatient hospital services; (3) other laboratory and X-ray services; (4) skilled nursing facility services, screening and diagnosis of children, family planning services and supplies furnished to individuals of child bearing age; and (5) physicians' services furnished by a physician whether in the office, patient's home, hospital or elsewhere."

Doe v. Wohlgemuth, supra at 183.

2. Equality requirements

Another section of the Act requires the assistance made available to the categorically needy to be equitably

distributed, and to be equal to the assistance made available to the medically needy:

> "(a) A State plan for medical assistance must—
>
> . . .
>
> (10) provide—
>
> (A) for making medical assistance available to all individuals receiving aid or assistance under any plan of the State approved under subchapter I, X, XIV, or XVI, or part A of subchapter IV of this chapter, or with respect to whom supplemental security income benefits are being paid under subchapter XVI of this chapter;
>
> (B) that the medical assistance made available to any individual described in clause (A)—
>
> (i) *shall not be less in amount, duration, or scope* than the medical assistance made available to any other such individual, and
>
> (ii) *shall not be less in amount, duration, or scope* than the medical assistance made available to individuals not described in clause A; and
>
> (C) if medical assistance is included for any group of individuals who are not described in clause (A) and who do not meet the income and resources requirements of the appropriate State plan, or the supplemental security income program under subchapter XVI of this chapter, as the case may be, as determined in accordance with standards prescribed by the Secretary—

> (i) for making medical assistance available to all individuals who would, except for income and resources, be eligible for aid or assistance under any such State plan or to have paid with respect to them supplemental security income benefits under subchapter XVI of this chapter, and who have insufficient (as determined in accordance with comparable standards) income and resources to meet the costs of necessary medical and remedial care and services, and
>
> (ii) that the medical assistance made available to all individuals not described in clause (A) *shall be equal in amount, duration, and scope;* . . . ."

Section 1396a (a) (10) (emphasis added).

C. *General limitations on state discretion*

1. Economy

In addition to the above express limitations on state prerogatives, the Act and its history include more general statements of purpose. These also are binding upon the participating states. Section 1396a (a) (17) (A) requires state-adopted standards for the receipt of benefits to be "consistent with the objectives of this subchapter [Title XIX]." See also *King v. Smith* and *Rosado v. Wyman, supra.*

Section 1396a (a) (30) requires the states to take such steps "as may be necessary to safeguard against unnecessary utilization of . . . care and services." This same emphasis upon payment for "necessary" medical services is reflected in §1396, the appropriations section, which states that the purpose of the Act is "to furnish (1) medical

assistance on behalf of families . . . whose income and resources are insufficient to meet the costs of necessary medical services." Similar language appears in the definition in §1396a (a) (10) (C) (i) of the medically needy.[12] Limiting payments to those services which are "necessary" is is also supported by recent amendments to Title XIX, which evidence a strong congressional interest in economy.[13]

2. Physicians' discretion

It is also apparent that Congress intended to place the primary authority for determining what treatment a particular recipient requires in the hands of the attending physician. The Senate Committee on Finance, which in 1965 reported favorably on the amendments to the Social

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[12] Two district courts agree with the conclusion that Congress intended to fund only "necessary" medical expenses. *Roe v. Ferguson*, slip opinion at 6-8, Civ. A. No. 74-315 (S. D. Ohio, Sept. 16, 1974), *rev'd*, 43 U. S. L. W. 2452 (6th Cir., No. 74-2195, Apr. 28, 1975); *Klein v. Nassau Cty. Med. Ctr.*, 347 F. Supp. 496, 499 (E.D.N.Y. 1972), *vacated and remanded* for further consideration in light of *Roe v. Wade* and *Doe v. Bolton*, 412 U. S. 925 (1973). A third district court was more troubled by the absence of "necessary" as a limitation on available medical services. *Roe v. Norton*, *supra* at 728-29. The *Roe v. Norton* court appears to have overlooked §1396a(a)(31), but it made the important observation that Medicare (Title XVIII) excludes payment for services "which are not reasonable and necessary for the diagnosis or treatment of illness or injury or to improve the functioning of a malformed body member." 42 U. S. C. A. §1395y(a)(1) (1974). *Roe v. Norton*, *supra* at 729. The court found the legislative history of Medicare and Medicaid to support "a common interpretation of both titles." *Id.*

[13] See note 14 below.

Security Act that included the creation of Title XIX, wrote:

> "3. General provisions relating to the basic and voluntary supplementary plans
>
> "(a) Conditions and limitations on payment for services
>
> "(1) Physicians' role
>
> "The committee's bill provides that the physician is to be the key figure in determining utilization of health services—and provides that it is a physician who is to decide upon admission to a hospital, order tests, drugs and treatments, and determine the length of stay."

S. Rep. No. 404, 89th Cong., 1st Sess., 1965 U. S. Code Cong. & Admin. News 1943, 1986. Although these remarks referred to the amendments to Medicare (Title XVIII), Congress understood Medicaid (Title XIX) as an expansion of the Medicare concept.

The same Committee wrote:

> "The committee bill is designed to liberalize the Federal law under which States operate their medical assistance programs so as to make medical services for the needy more generally available. To accomplish this objective, the committee bill would establish, effective January 1, 1966, a new title in the Social Security Act—'Title XIX: Grants to the States for Medical Assistance Programs.'"

Id. at 2014. Thus, in *Roe v. Norton*, 380 F. Supp. 726 (D. Conn. 1974), the court discerned "the basic philos-

ophy of both the Medicare and Medicaid provisions, which emphasizes the wide discretion to be accorded physicians in treating their patients." *Id.* at 729.[14]

We must conclude that although Title XIX involves a system of "cooperative federalism," the congressional hand has been rather heavy in circumscribing the area of state prerogative.

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[14] The original Act required participating states to move toward, and eventually to furnish, "comprehensive care and services to substantially all individuals who meet the plan's eligibility standards with respect to income and resources," Social Security Amendments of 1965, Title XIX, §1903(e), 79 Stat. 350. In response to the rapidly inflating cost of medical services, this section was repealed in 1972, Social Security Amendments of 1972, Title II, §230, 86 Stat. 1410, but Congress made clear that in repealing §1903(e) it did not mean to alter the essential goals of the Medicaid system:

> "Your committee also concluded that there is no simple or single solution to the problems now existing in the health care field which adversely affect these programs. But your committee does believe that there are modifications which can and should be made in these programs—changes which, while perhaps not very significant taken singly, as a whole, show great promise for making significant advances in accomplishing the goal of making these programs more economical and more capable of carrying out their original purposes."

H. R. Rep. No. 92-231, 92nd Cong., 2d Sess., 1972 U. S. Code Cong. & Admin. News 4989, 4994. See Comment, Abortion on Demand in a Post-*Wade* Context: Must the State Pay the Bills?, 41 Fordham L. Rev. 921, 932 (1973). It is, therefore, proper to conclude that the original purpose of protecting the physician's discretion in treatment was not intended to be altered by the 1972 repeal of §1903(e). The 1972 amendments do, however, demonstrate a congressional intent that the Medicaid funds be used in the most economical manner possible.

IV. THE PENNSYLVANIA REGULATIONS' CONSISTENCY WITH TITLE XIX

Pennsylvania argues that its abortion regulations pursue congressional objectives. The state relies on the congressional mandate, noted above, to provide only necessary services, arguing that its regulations restrict payments for abortions to those which are "necessary," excluding those which are "elective." The argument proves too much. It is undoubtedly true that at the time a woman chooses to have a non-therapeutic abortion there is a greater quantum of personal freedom than at the time she has a therapeutic abortion or goes into labor. But there is also greater freedom of choice involved when one decides to have a tooth cavity filled than when one is forced to have the tooth extracted after it has abscessed. The state could not require Title XIX beneficiaries to await the abscess and undergo the extraction[15] without damaging the broad purposes of Title XIX. And it is inconsistent with §1396a(a)(10)(B) and (C), which requires equality among beneficiaries, to force pregnant women to use the least voluntary method of treatment, while not imposing a similar requirement on other persons who qualify for aid.

The plaintiffs, on the other hand, place their reliance on the sections of the statute which require Pennsylvania to furnish them physicians' services, inpatient hospital services, outpatient services, and family planning ser-

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[15] We make this argument for illustrative purposes only. Although dental services may be provided under Medicaid, §1396d(a)(10), Pennsylvania does not do so. See note 11, *supra*.

vices.[16] Because Pennsylvania has chosen to extend coverage to the medically needy, and has chosen not to exercise its option under §1396a(a)(13)(C)(ii) subsection (13(C)(i) requires Pennsylvania to extend the services listed in the text to those plaintiffs who are on Public Assistance. For this reason, the plaintiffs are correct in arguing that the state is required to furnish all of them—both those who are categorically needy and those who are medically needy—the listed services.

In both the statute and the regulations of the Department of Health, Education and Welfare, physicians' services are defined by reference to the legal practice of medicine under state law. See §1396d(a)(5), referring to §1395x(r)(1); 45 C. F. R. §249.10(b)(5) (Rev. ed., Oct. 1, 1973). Since *Roe v. Wade*, 410 U. S. 113 (1973), and *Doe v. Bolton*, 410 U. S. 179 (1973), required the states to legalize the practice of elective abortion during the first two trimesters of pregnancy, the plaintiffs argue

[16] The district court opinion does not indicate whether all the plaintiffs are categorically needy. On reading the complaint and accompanying affidavits, we have found that six of the 11 named plaintiffs receive AFDC, while five receive "Public Assistance." AFDC is part A of Title IV; its recipients are therefore "categorically needy" and the state must provide them with services (1) through (5) of §1396d(a). §§1396a(a)(10)(A) and (13)(B). The services listed in the text are clauses (5), (1), (2), and 4(c), respectively, of §1396d(a). The plaintiffs receiving Public Assistance, on the other hand, are not categorically needy, but only medically needy. The state could, therefore, deny them Medicaid altogether or provide services other than those listed in the text, See pp. 8-10, *supra*. Nevertheless, Pennsylvania extends equal coverage to the medically and categorically needy. See note 11, supra.

that elective abortion is now included in the definition of "physicians' services," and is therefore required to be furnished to the plaintiffs by §1396a(a)(13)(B) and (C).[17] Similar arguments are advanced under the rubrics of "inpatient hospital services," "outpatient hospital services," and "family planning services."

Again, the argument proves too much. Elective cosmetic surgery, for example, is within the licensed practice of medicine in most, if not all, states. If the plaintiffs were correct, the state would be required to pay for such procedures, at the expense, perhaps, of many pressing medical needs of the poor.[18] While §1903(e) of the original Act may have required the eventual finding of such procedures,[19] its repeal indicates that Congress has no present intention of funding every procedure which falls within the legal practice of medicine. The states are given broad discretion to tailor their programs to their particular needs, and are required to economize and to fund only necessary medical expenses.

The problem for this court is to harmonize the various competing policies found in the Act and its history. A participating state should be able to adapt its program to its conditions and needs, and to limit the level of its Medicaid expenditures. This can be accomplished by giving the state broad discretion to define the medical conditions for which treatment is "necessary" within the mean-

[17] See note 15, supra. A similar argument appears in Comment, *supra* note 14, at 937 n. 106.

[18] New York's Medicaid program, for example, appears to exclude elective cosmetic surgery. See *Klein*, *supra* note 12, at 500. We have not been apprised whether Pennsylvania's does so or not.

[19] See note 14, *supra*.

ing of the Act.[20] The proper treatment of such a condition, on the other hand, must be left to the judgment of the attending physician.[21] See *Roe v. Norton, supra* at 729. Vesting such discretion in the physician is consistent with congressional objectives, see p. 13, *supra;* it is also a logical prerequisite to any program intended to bring valid medical assistance to the needy.[21a] See §1396a(a)(19) (requiring states to safeguard "the best interest of the recipients").

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[20] This court is not the first one to relate "necessary" to the conditions to be treated, rather than to the choice of treatment. See *Roe v. Norton, supra* at 729, *Klein v. Nassau Cty. Med. Ctr., supra* note 12, at 500.

[21] The range of the doctor's discretion is in turn defined by each state's definition of the legal practice of medicine. See pp. 16-17, *supra.*

[21a] In the Amicus Curiae Memorandum of the United States, filed in *New York, etc. v. Klein, et al.*, 412 U. S. 925 (1973), and relied on extensively in Judge Kalodner's dissent, this language appears at pages 7-8:

> "But the state appellants have properly refused to intrude on the physician's judgment; they are completely 'guided by the ruling of the woman's physician as to whether an abortion is medically indicated' (J.S. 11). Thus the state appellants, in administering the New York Medicaid program, simply treat abortions in the same manner as other medical services: they defer to the medical judgment of the attending physician. If in the judgment of the patient's physician a particular medical service—whether an abortion or an appendectomy—is advisable to preserve health, that medical service is covered by the New York medicaid program.
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> "The court below misunderstood the crucial role played by the woman's physician in the New York scheme. . . . [T]he district court simply assumed that the abortions sought were not medically indicated (J.S. App. A, 4a), but this was a medical judgment which the court was not in a position to make. Contrary to the court's assumption, it is possible that an attending physician would have concluded that an abortion was medically indicated with respect to one or more of the appellees.
>
> "At bottom, therefore, appellees' argument apparently is that the Social Security Act requires reimbursement of the costs of all medically feasible abortions performed merely upon the demand of pregnant women. We see no statutory basis for this contention. An abortion is a serious medical matter which requires an exercise of medical judgment. A state need not provide medical assistance with respect to other medical services—such as, for example, a tonsillectomy—merely upon the patient's own request, and there is no apparent reason why abortions should be treated differently."

The Memorandum also quoted from *Doe v. Bolton, supra,* and *Roe v. Wade, supra,* as follows at pp. 8-9:

> "Our conclusion is reinforced by this court's recent statements concerning the nature of the medical judgment here in question and the importance of that judgment to the expectant mother. In *Doe v. Bolton,* No. 70-40, decided January 22, 1973, slip op. at 11-12, the Court stated:
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> '• • • the medical judgment may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient. All these factors may relate to health. This allows the attending physician the room he needs to make his best medical judgment. And it is room that operates for the benefit, not the disadvantage, of the pregnant woman.'
>
> "And in *Roe v. Wade,* No. 70-18, decided January 22, 1973, slip op. at 49, the Court emphasized the critical importance of the attending physician's role by concluding that, as a constitutional matter, during the first trimester of pregnancy 'the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.' We agree that the role of the attending physi-

Of course, some regulation of the methods of treatment is reasonable, and unavoidable. But the state should be required to show that, on balance, the policies of Title XIX support the regulations in question. See *Doe v. Rose,* 499 F. 2d 1112, 1114 (10th Cir. 1974) ("the respective states are empowered to impose reasonable standards *for carrying out the objectives of the federal program")* (emphasis added). Under §1396a(a) (19), for example, the state might require some procedures to be performed in hospitals, to protect the medical interests of the recipients. Or, pursuant to the congressional interest in economization, the state might require doctors to prescribe generic drugs rather than brand names, provided, of course, that

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cian is and should be an important one, and we therefore believe that the state appellants have acted reasonably in preserving that role under the medicaid program."

If the plaintiffs' physicians do not approve their desired abortions, such abortions will not qualify under Title XIX. The procedures, with their requirements for examination by two additional physicians, as well as the physician of each plaintiff, etc., are clearly not supported by the above Memorandum.

Also, the M. S. A. of HEW policy, set forth in note 5 at 376 F. Supp. 179 and at 1 CCH Medicare and Medicaid Guide ¶14,511, also relied on in Judge Kalodner's dissent (see, for example, note 18 at page 16), does not support such procedures. It is noted that ¶14,515 of 1 CCH Medicare and Medicaid Guide, entitled "Equality of Medical Care," contains this wording of CCH, *inter alia*:

> "The regulations (Reg. §249.10(a)(6), ¶21,610) provide that the medical and remedial care and services made available to any categorically needy individual included under the plan will not be less in amount, duration, or scope than those made available to other individuals included under the program. . . ."

this would, in the particular instance, be consistent with sound medical practice. Gratuitous interference with medical decisions by doctors, on the other hand, would create a system of medical obstruction, rather than of medical assistance.

Applying the above analysis to the Pennsylvania regulations before us, we find them to be inconsistent with the Act. Since the Commonwealth of Pennsylvania pays for full-term deliveries and also for therapeutic abortions, it is plain that the state has determined, in its discretion, that pregnancy is a condition for which medical treatment is "necessary" within the meaning of Title XIX. The next question is whether some justification can be found in the statute for preventing an attending physician from choosing non-therapeutic abortion as the method for treating a pregnancy.[22] We can find none. Economy will not do, since in most cases non-therapeutic abortion is the cheapest method of treatment. See *Doe v. Rose, supra* at 1116-17, *citing Klein v. Nassau Cty. Med. Ctr., supra* note 12; *Doe v. Wohlgemuth, supra* at 187. Nor will protection of the recipient's health, under §1396a(a) (19) suffice; the state itself admitted at oral argument that non-therapeutic abortion is the least dangerous alternative for the pregnant woman, at least during the first trimester. See *Roe v. Wade, supra* at 163. Not only are the state's abortion regulations not justified by any statutory policy, but they also run directly counter to §1396a(a) (10) (B)

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[22] As stated by the Supreme Court in *Doe v. Bolton, supra,* at 192:

> "Whether . . . 'an abortion is necessary' is a professional judgment that the . . . physician will be called upon to make routinely."

and (C), since the "least voluntary method of treatment" requirement which the regulations impose on pregnant women is imposed on no other class of recipient. We therefore conclude that once the state has decided to finance full-term delivery and therapeutic abortion as methods for the treatment of pregnancy, it cannot decline to finance non-therapeutic abortions without violating the requirements of Title XIX. Since the decisions of the Supreme Court have forced the states to include elective abortion in the legal practice of medicine through the second trimester of pregnancy,[23] we also hold that the statute requires Pennsylvania to fund abortions through the end of the second trimester.[24]

V. CONTRARY ARGUMENTS REJECTED

In reaching the above conclusion, we are not unmindful that other courts have found state provisions like Pennsylvania's to be consistent with the statutory scheme. In *Roe v. Ferguson*, 43 U.S. L.W. 2452 (6th Cir. No. 74-2195, Apr. 28, 1975), the Sixth Circuit reversed a district court's holding that Title XIX requires state funding for elective abortions. The court wrote:

> "There is no indication that Congress intended to require the furnishing of abortion services not

[23] See *Roe v. Wade, supra* at 164; see also note 21, *supra*.

[24] Because the medical risk to a pregnant woman is somewhat enhanced during the second trimester, see *Roe v. Wade, supra* at 163, the state might require second trimester abortions funded by PMAP to be performed under physical conditions—*e.g.*, in a hospital—which protect the health of the aborting woman. §1396a (a)(19). See also *Roe v. Wade, supra* at 163; *Doe v. Bolton, supra* at 194-95.

> required for the preservation of the health of the woman at a time when the performance of such abortions was illegal in most jurisdictions. In view of the disfavor shown toward abortions in other legislation, we are reluctant to infer that Congress intended to include required coverage for such controversial services without even mentioning the subject. When Congress passed the Family Planning Services and Research Act of 1970, 42 U.S.C. §§300a et seq., providing funds to states opting to participate in creating comprehensive programs of family planning services, abortion was specifically excluded as a means of family planning to be recognized under the Act. 42 U.S.C. §300a-6.
>
> "In establishing the Legal Services Corporation system, Congress again provided that no funds of the Corporation could be used for legal assistance for those seeking to procure a non-therapeutic abortion. 42 U.S.C. §2996f(b)(8)." *Id.*

See also *Doe v. Rose, supra* at 1114-15 ("prefer-[ring]" to decide the case on constitutional grounds in light of the Act's silence on the abortion question); *Doe v. Wohlgemuth, supra.* We find none of these arguments to be persuasive. It is impossible to believe that in enacting Title XIX Congress intended to freeze the medical services available to recipients at those which were legal in 1965. Congress surely intended Medicaid to pay for drugs not legally marketable under the FDA's regulations in 1965 which are subsequently found to be marketable. We can see no reason why the same analysis should not apply to the Supreme Court's legalization of elective abortion in 1973. The inference which the Sixth Circuit drew

from legislation in which Congress prohibited expenditure for non-therapeutic abortions also seems unwarranted. Congress could have proscribed payment for elective abortions when it passed the Family Planning Services and Research Act of 1970, or in 1972 when it amended Title XIX, but it did not do so. See Comment, *supra* note 14, at 933 n.80. Furthermore, abortions are hardly a desirable method of family planning; this consideration may explain the provisions of the Family Planning Services and Research Act relied upon by the Sixth Circuit.

VI. CONCLUSION AND DISTRICT COURT ACTION ON REMAND

For the foregoing reasons, the plaintiffs are entitled to a declaratory judgment declaring that the Pennsylvania regulations are inconsistent with Title XIX of the Social Security Act, 42 U.S.C.A. §1396 *et seq.*, during the first and second trimesters of pregnancy.

In *Hagans v. Lavine, supra* at 543-44, the Supreme Court pointed out that a single district judge can grant both declaratory and injunctive relief on statutory grounds in a case such as this, using this language (415 U.S. 543):

> "Given a constitutional question over which the District Court had jurisdiction, it also had jurisdiction over the 'statutory' claim. See *supra*, at 536. The latter was to be decided first and the former not reached if the statutory claim was dispositive. [Citing cases.] The constitutional claim could be adjudicated only by a three-judge court, but the statutory claim was within the jurisdiction of a single district judge. [Citing cases.] Thus, the District Judge, sitting alone, moved directly to the statutory claim. His decision was appealed to the Court of Appeals, although had a three-judge court been convened, an injunction issued, and the statutory ground alone decided, the appeal would be only to this Court under 28 U.S.C. §1253."

The court went on to state at 543-45:

> "The procedure followed by the District Court—initial determination of substantiality and then adjudication of the 'statutory' claim without convening a three-judge court— . . . accurately reflects the recent evolution of three-judge-court jurisprudence . . . .
>
> . . .
>
> "It is true that the constitutional claim would warrant convening a three-judge court and that if a single judge rejects the statutory claim, a three-judge court must be called to consider the constitutional issue. Nevertheless, the coincidence of a constitutional and statutory claim should not automatically require a single-judge district court to defer to a three-judge panel, which, in view of what we have said in *Rosado v. Wyman, supra,* could then merely pass the statutory claim back to the single judge. [Citing cases.] 'In fact, it would be grossly inefficient to send a three-judge court a claim which will only be sent immediately back. This inefficiency is especially apparent if the single judge's decision resolves the case, for there is then no need to convene the three-judge court.' [Citing case.] Section 2281 does not forbid this practice, and we are not inclined to read that statute 'in isolation with mutilating literalness . . . .'"

We have quoted the foregoing because we hold at this time that the majority opinion in *Murrow v. Clifford*, 502 F. 2d 1066 (3d Cir. 1974), will not be followed insofar as it is inconsistent with (a) part II of *Hagans v. Lavine, supra*[25] and (b) this opinion.

Because of our power to modify the May 28, 1974, Supplemental Order of the district court under 28 U.S.C. §2106, we will direct that it be modified to read as follows, and the case will be remanded to the district court so that the three-judge court can be dissolved, the assigned district judge to take any further action required consistent with this opinion:

> ". . . IT IS HEREBY ADJUDGED AND DECREED that the Regulations and Procedures of the Department of Public Welfare of the Commonwealth of Pennsylvania, as they apply to reimbursement for abortions performed within the first two trimesters of pregnancy, are invalid because they are inconsistent with Title XIX of the Social Security Act, 42 U.S.C. §1396, *et seq.* In all other respects, Plaintiffs' Requests for Declaratory Judgment are denied."

Costs shall be taxed against defendant-appellants at No. 74-1726.

To the Clerk:

Please file the foregoing opinion.

Circuit Judge

[25] *Cf. Philbrook v. Glodgett*, 43 U. S. L. W. 4702, note 8 at 4704 (U. S., No. 73-1820, June 9, 1975).

KALODNER, *Circuit Judge*, dissenting.

The majority holds that "the plaintiffs are entitled to a declaratory judgment declaring that *the Pennsylvania regulations are inconsistent with Title XIX of the Social Security Act, 42 U.S.C.A. §1396 et seq.;* during the first and second trimesters of pregnancy," and further concludes that "it is unnecessary to reach the plaintiffs' constitutional arguments." (emphasis supplied).

I dissent from the majority's holding that "the Pennsylvania regulations are inconsistent with the Social Security Act." I disagree, too, with its conclusion that "it is unnecessary to reach the plaintiffs' constitutional arguments."

I would affirm the holding of the three-judge court that the *"Pennsylvania Regulations do not conflict with Title XIX of the Social Security Act."*[1] (emphasis supplied).

I would also reverse the holding of the court below that "the Regulations and/or Procedures of the Pennsylvania Medical Assistance Program are unconstitutional because they are in violation of the Equal Protection Clause since they create an unlawful distinction between individual women who choose to carry their pregnancies to birth, and indigent women who choose to terminate their pregnancies by abortion."[2]

I would, however, enjoin enforcement of the Regulations on the ground that they are being administered in violation of the Equal Protection Clause of the Fourteenth

[1] 376 F. Supp. 173, 186 (W.D. Pa. 1974).

[2] *Id.* at 191.

Amendment in that they are *not enforced* against welfare recipients who threaten suit when they are denied reimbursement for non-therapeutic abortions, and *enforced only* against those who do not threaten suit. It is settled that State administrative procedures which are *per se* valid and constitutional may nevertheless be enjoined when they are unconstitutionally applied.

The views expressed will be discussed *seriatim* as follows:

I. THE PENNSYLVANIA REGULATIONS' CONSISTENCY WITH TITLE XIX

This must be said in preface:

First, two other Circuit Courts which have spoken to the question have expressly refused to subscribe to the view now espoused by the majority. *Rose v. Ferguson,* 43 U.S.L.W. 2452 (6th Cir. April 28, 1975); *Doe v. Rose,* 499 F. 2d 1112 (10th Cir. 1974).

Second, the majority's holding of inconsistency is nourished only by a single district court decision, *Roe v. Norton,* 380 F. Supp. 726 (D. Conn. 1974).

Third, our brother Weis, a member of the three-judge court below, specifically expressed his concurrence with its holding that the Regulations are not inconsistent with Title XIX, albeit he dissented from its holding that the Regulations are unconstitutional.[3]

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[3] Judge Weis stated: "I also concur in the court's holding that the State regulations are not in conflict with the federal statute." 376 F. Supp. at 192 n.1.

Fourth, the specific question "[*w*]*hether the Social Security Act requires a federally-funded state medicaid program to pay for abortions that are not medically indicated,*" was answered in the negative by the Solicitor General of the United States in a "Memorandum for the United States as Amicus Curiae."[4] (emphasis supplied).

Fifth, The Medical Assistance Services Administration in the Social and Rehabilitation Service of the Department of Health, Education, and Welfare, which administers the Medicaid aspect of the Social Security Act, has made it clear in a statement on its "position" on abortion, that a state participating in the Medicaid program has the *option* of funding abortions, and, if it does, "the Federal Government shares the costs with the State."[5]

The points outlined will be more fully developed after the following discussion of the critical provisions of Title XIX and the Regulations.

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[4] The "Memorandum" was filed in Commissioner of Social Service of New York et al. v. Klein and Nassau County Medical Center et al. v. Klein et al., 412 U.S. 925 (1973) (hereinafter cited as Amicus Curiae Memorandum). It recites that "[t]his memorandum is filed in response to the Court's invitation to the Solicitor General to file a memorandum expressing the views of the United States on the statutory issues." *Id.* at 1.

[5] 1 CCH Medicare and Medicaid Guide ¶14,511; *see too* 41 Penna. Bulletin 2207 n.4 (Sept. 29, 1973) (Opinion Letter, dated Aug. 6, 1973, from Israel Packel, Atty. Gen. of Penna., to Helene Wohlgemuth, Sec'y of Penna. Dept. of Public Welfare, on the *Effect of United States Supreme Court Decisions on Department of Public Welfare Medical Assistance Regulations on Abortions;* noted in the opinion of the district court. 376 F. Supp. at 178 n.5.

Title XIX of the Social Security Act, popularly known as Medicaid, and the federal regulations promulgated thereunder, establish a comprehensive system of health care for the needy. In the spirit of "cooperative federalism," Congress annually appropriates funds to enable each state, "as far as practicable under the conditions in such state, to furnish . . . medical assistance" to designated families and individuals "whose income and resources are insufficient to meet the costs of *necessary medical services.*" 42 U.S.C. §1396. (emphasis supplied).

A state is not required to participate in the Medicaid Program, but if it chooses to become a participant, it must submit a plan for medical assistance to the Department of Health, Education, and Welfare ("HEW") for approval, which is conditioned upon the plan comporting with the provisions of Title XIX. *See* 42 U.S.C. §§1396, 1396a(b). Thereafter, operation of the program is under state direction with continuing eligibility for federal grants subject to the state's compliance with the originally approved plan and federal regulations. *See* 42 U.S.C. §1396c; 45 C.F.R. §§246-280.

As dictated by the federal statute and regulations, a state's Medicaid program *must* provide medical assistance[6] to the "categorically needy," as spelled out by the majority. *See* 42 U.S.C. §1396a(a)(10)(A).

A state *may* decide to limit coverage to the "categorically needy," or it *may* decide to include within the

[6] "Medical assistance" is functionally defined by the Social Security Act in terms of part or total payment for seventeen different types of services reimbursable under the Medicaid Program. 42 U.S.C. §1396d(a).

scope of its Medicaid program other groups or individuals in need of "necessary medical services."

A state whose medical assistance program extends beyond the "categorically needy," has the option of providing the five services made mandatory as to those in the "categorically needy" class, or selecting any seven of the services listed in clauses (1) through (16) of §1396d(a). *See* 42 U.S.C. §1396a(a)(13).

The five services made mandatory as to the "categorically needy" (included in Pennsylvania's Medicaid program) are:

> "(1) inpatient hospital services (other than services in an institution for tuberculosis or mental diseases);
>
> "(2) outpatient hospital services;
>
> "(3) other laboratory and X-ray services;
>
> "(4)(A) skilled nursing facility services (other than services in an institution for tuberculosis or mental diseases) for individuals 21 years of age or older (B) effective July 1, 1969, such early and periodic screening and diagnosis of individuals who are eligible under the plan and are under the age of 21 to ascertain their physical or mental defects, and such health care, treatment, and other measures to correct or ameliorate defects and chronic conditions discovered thereby, as may be provided in regulations of the Secretary; and (C) family planning services and supplies furnished (directly or under arrangements with others) to individuals of child-bearing age (including minors who can be considered to be sex-

ually active) who are eligible under the State plan and who desire such services and supplies;

"(5) physicians' services furnished by a physician . . . whether furnished in the office, the patient's home, a hospital, or a skilled nursing facility, or elsewhere," §1396d(a).

A state is required to include in its Medicaid plan "reasonable standards . . . for determining eligibility for and the extent of medical assistance under the plan which . . . are consistent with the objectives of [Title XIX]. . . ." 42 U.S.C. §1396a(a)(17). A state may properly limit the coverage of its Medicaid program to the costs of "necessary medical services." A state plan for medical assistance *must* provide that a method of "utilization review" be established for each item of care or services listed in 42 U.S.C. §1396d(a) so as "to safeguard against unnecessary utilization of such care and services. . . ." 42 U.S.C. §1936(a)(30) [sic*]; 45 C.F.R. §250.20(a). The federal regulations specifically authorize "[a]ppropriate limits . . . placed on services based on such criteria as medical necessity or those contained in utilization or medical review procedures." 45 C.F.R. §249.10(a)(5)(i).

Furthermore, any medical services made available to a "categorically needy" person must not be less in "amount, duration, or scope" than that provided other groups or individuals. Services made available to a group other than the "categorically needy" must be equal in "amount, duration, and scope" for all individuals within

* Citation used by Judge Kalodner appears to be incorrect and the correct citation should read §1396(a)(30).

the group, 42 U.S.C. §1396a(a)(10), but may be less than or differ from those benefits provided the "categorically needy."[7]

In summary outline, Title XIX provides for a federal-state funded program which permits each state to decide whether it will participate and what services it will provide, and to whom, subject to the requirement that certain welfare recipients must be included and certain items of basic medical care must be furnished.[8]

The Pennsylvania Medical Assistance Program ("PMAP") was designed to comport with the requirements of Title XIX. It provides, *inter alia,* for reimbursement for medical services to the "categorically needy," and the "medically needy," affording to the latter the five services made mandatory as to the "categorically needy,"[9] earlier here spelled out.

Regulations pertaining to the administration of PMAP provide for reimbursement of costs of an abortion *only* where "there is documented medical evidence," submitted by the attending physician and two other physicians, that "continuance of the pregnancy may threaten the health or life of the mother," or, that "the infant may be born with incapacitating physical deformity or mental deficiency," or, that "a continuance of pregnancy resulting from legally established statutory or forcible rape or incest, may constitute a threat to the mental or physical health of a patient," and "the procedure is performed in

[7] *See* Stevens and Stevens, ***Medicaid*: *Anatomy of a Dilemma,*** 35 Law & Contemp. Prob. 348, 363 (1970) (hereinafter cited as Stevens).

[8] 1 CCH Medicare and Medicaid Guide, ¶14,010.

[9] *Id.* at ¶15,632; 62 P.S. §§432, 441.1.

a hospital accredited by the Joint Commission on Accreditation of Hospitals."

The recited provisions of the Regulations, as the majority has well said, "in effect . . . define a compensable 'therapeutic' abortion, and exclude payment for non-therapeutic, or 'elective' abortions."

The plaintiff-welfare recipients contended below that the cited Regulations contravene Title XIX, because, in their view, *an abortion,* whether it be therapeutic or non-therapeutic, *is a "necessary medical service"* within the meaning of the Title and the purview of its categories of "physicians' services"; "inpatient and outpatient hospital services", and "family services."

In disposing of these contentions, the court below said:

> *"Congress was silent with respect to specific authorization of medical assistance for abortions. Pennsylvania standards must be scrutinized without curtailment by Congressional action and the State Regulations and/or Procedures must be given great latitude in providing for the administration of the Program.* We, therefore, feel compelled to find *Pennsylvania's Regulations do not conflict with Title XIX of the Social Security Act."*[10] (emphasis supplied).

The foregoing holding was prefaced by this significant statement:

> "But, even if we assume, as do the Plaintiffs, that abortion payments are clearly authorized under

[10] 376 F. Supp. at 185-86.

> Title XIX of the Social Security Act, nevertheless, Congress has given the States great latitude in establishing standards for the administration of the various plans, under the doctrine of a *'scheme of cooperative federalism.'* "[11]

The distilled essence of the holding below is that Title XIX does not, *per se,* require a Medicaid state to pay for a non-therapeutic abortion, and accordingly the Pennsylvania Regulations denying payment for such an abortion does not conflict with Title XIX.

The distilled essence of the majority's holding is that Title XIX, *per se, requires* a Medicaid state to pay for a non-therapeutic abortion "once the state had decided to finance full-term delivery and therapeutic abortion as methods for the treatment of pregnancy."

The Achilles' heel of the majority's holding is its *non-sequitor* application of recent Supreme Court decisions,[12] in which no issue as to the sweep of Title XIX was involved, and the critical question presented related *only* to constitutional challenges to state statutes making performance of a non-therapeutic abortion a crime.

The majority's application of these Supreme Court decisions is manifested by its following statement:

> *"Since the decisions of the Supreme Court have forced the states to include elective abortion in the legal practice of medicine* through the second trimester of pregnancy, *we also hold that the statute*

[11] *Id.* at 184.

[12] Roe v. Wade, 410 U.S. 113 (1973); Doe v. Bolton, 410 U.S. 179 (1973).

> [*Title XIX*] *requires Pennsylvania to fund abortions through the end of the second trimester.*" (emphasis supplied).

It need only be said on the score of the foregoing, that the 1973 Supreme Court decisions, which make legal a physician's performance of an elective abortion, cannot be utilized to construe the earlier enacted Title XIX[13] as *requiring* a Medicaid state to pay the expenses of such an abortion, albeit these decisions are applicable to the presented issue of constitutionality of the Pennsylvania Regulations which has been avoided by the majority.

As earlier noted, two other circuits which have spoken to the Title XIX issue have subscribed to the holding of the court below and expressly refused to subscribe to the view espoused by the majority.

In *Doe v. Rose,* 499 F. 2d 1112 (10th Cir. 1974), constitutional and statutory challenges were presented to the Utah Department of Social Services' "informal policy" concerning abortions.

The "informal policy" provided that a pregnant woman was not entitled to an abortion at the expense of Utah's Medicaid program without prior approval as a "therapeutic abortion" by the Executive Director of the Department. The "informal policy" defined a "therapeutic abortion" as one necessary to save the life of the expectant mother or to prevent serious and permanent impairment to her physical health, and none other.

The district court granted the plaintiffs' request for an injunction restraining enforcement of the "informal

[13] Title XIX was first enacted in 1965, and amended in 1972.

policy" on both statutory and constitutional grounds. The Tenth Circuit, on review, affirmed on the constitutional grounds only, declaring that it preferred to do so for these reasons:

> "At the outset, so far as we are advised the applicable federal statutes regarding Medicaid make no mention, as such, of abortions. Hence, we lack specific guidance as to whether Congress intended that abortions be covered by Medicaid and, if so, more critically, *which* abortions were to be covered by medicaid benefits. . . .
>
> "The implementing state statutes of Utah, as well as the latter's state plan, submitted to and approved by the federal authorities, also make no mention, as such, of abortions. Hence, this is not an instance where the administrative policy under attack is mandated by either state or federal statute. By the same token, *in our view there is nothing in either the federal or state statutes which specifically bars the policy here followed by Rose.* In this regard, we are mindful of the Supreme Court's preference for statutory, as opposed to constitutional, resolution of welfare controversies. See Wyman v. Rothstein, 398 U.S. 275, 90 S. Ct. 1582, 26 L. Ed. 2d 218 (1970). Nevertheless, in light of the applicable statutes' complete silence on the abortion question, we prefer to dispose of the present appeal on constitutional grounds, rather than by any strained effort to show that the policy in question is, in effect, though not in so many words, prohibited by either federal or state statute. . . ." 499 F. 2d at 1114-1115. (emphasis supplied).

The Sixth Circuit, in *Roe v. Ferguson*, 43 U.S.L.W. 2452 (6th Cir. April 28, 1975), reversed the district court's holding that Title XIX was contravened by administrative rulings by the Auditor of the State of Ohio and an Ohio statute which prohibited reimbursement for elective abortions to state Medicaid recipients.

In doing so, the Court expressly declared its accord with *Doe v. Rose, supra*, and the holding of the court below in the instant case, on the Title XIX issue, in the following statement:

> "*We are in accord with the decisions which have found no conflict between state restrictions of of Medicaid payments to elective abortions and the provisions of the Social Security Act. There is no indication that Congress intended to require the furnishing of abortion services not required for the preservation of the health of the woman at a time when the performance of such abortions was illegal in most jurisdictions.* In view of the disfavor shown toward abortions in other legislation, we are reluctant to infer that Congress intended to include required coverage for such controversial services without even mentioning the subject. When Congress passed the Family Planning Services and Research Act of 1970, 42 U.S.C. §§300a *et seq.* providing funds to states opting to participate in creating comprehensive programs of family planning services, abortion was specifically excluded as a means of family planning to be recognized under the Act. 42 U.S.C. §300a-6.
>
> "In establishing the Legal Services Corporation system, Congress again provided that no funds of the

Corporation could be used for legal assistance for those seeking to procure a non-therapeutic abortion. 42 U.S.C. §2996f (b) (8).

> "In view of this evidence of the Congressional attitude toward abortion as a family planning technique or as an acceptable medical service in general, it is difficult to construe the silence of Congress in Title XIX as an endorsement of the view that non-therapeutic abortions are included in the 'necessary medical services' required to be furnished by a state participating in Medicaid. This is not to say that Congress may constitutionally exclude such abortion services from coverage in the Medicaid program. *In the absence of a legislative history indicating a contrary position, however, we cannot say that the statute itself prohibits such an exclusion.*" (emphasis supplied).[14]

As earlier stated, the majority's holding is nourished *only* by a single district court case—*Roe v. Norton, supra.* There, the narrow issue presented was whether Title XIX *prohibited* "federal reimbursement for the expenses of an [elective] abortion," and thus *compelled* a Medicaid state to deny reimbursement for such an abortion. The issue arose by reason of the adoption of a regulation by the Connecticut Welfare Department banning reimbursement

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[14] It must be noted that the Court in *Roe* remanded the case for consideration of the constitutional issue by a three-judge court, and that the Tenth Circuit in Doe v. Rose ruled that the denial of benefits for a non-therapeutic abortion was unconstitutional, albeit, it reversed the district court's ruling there that the denial contravened Title XIX. The stated unconstitutionality ruling will be discussed later.

for non-therapeutic abortions because of its belief that it was *compelled* to do so by Title XIX.[15] The district court ruled that "Title XIX must be construed to *permit* payment for elective abortions." In doing so, the district court further held that the Title "must be construed . . . to *prohibit* state regulations that impair a woman's exercise of her right in consultation only with her physician to have an [elective] abortion."[16]

It must immediately be noted that the stated further holding is dictum under the prevailing circumstances.

Coming now to the majority's disregard of the views expressed by the Solicitor General of the United States, and the federal agency which administers the Medicaid program, on the score of the reach of Title XIX, in its holding that "the Pennsylvania Regulations are inconsistent with Title XIX":

As already stated, the Solicitor General in his Amicus Curiae Memorandum[17] specifically opined that "the Social Security Act does *not* require a federally-funded state medicaid program to pay for abortions that are not medically indicated," and, the federal agency which administers the Medicaid program, in a statement on its "position" on abortion,[18] made it clear that a Medicaid state has the

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[15] 380 F. Supp. 726, 728 n.2.

[16] *Id.* at 730.

[17] *See* note 4, *supra*.

[18] The Medical Assistance Services Administration in the Social and Rehabilitation Service of the Department of Health, Education, and Welfare, which administers the Medicaid aspect of the Social Security Act, made the following response to an inquiry of the Attorney General of Pennsylvania anent federal sharing with a Medicaid state of abortion payments:

option of funding abortions, and if it does, "the federal Government shares the costs with the State."

A more recent statement made by the Social and Rehabilitation Service, under which the Medical Services Administration operates, further reflects the Government's view that Title XIX does not *exclude* non-therapeutic abortions.

The statement declares in relevant part that "under Title XIX, federal financial participation is *available* for *any* abortions *for which* the state welfare agency provides."[19] (emphasis supplied).

"The position taken by the Medical Services Administration on abortion is that the Social Security Act and the HEW Regulations provide for Federal matching of State expenditures for all kinds of medical care and services, including inpatient hospital services, outpatient hospital services, physician services, drugs, etc. *If* the State Medicaid program pays for these services, *whether for abortion, or any other medical procedure,* the Federal Government shares the costs with the State." (emphasis supplied). *See too,* note 5, *supra.*

[19] Roe v. Norton, 380 F. Supp. 726, 730 (D. Conn. 1974) (citing the view of an associate commissioner of the Social and Rehabilitation Service).

As another indication of the Government's view that Title XIX, as enacted, *permits* but does not *require* funding of non-therapeutic abortions, the Social and Rehabilitation Service has proposed to redefine the Title's "family planning services" provisions so that "neither therapeutic nor non-therapeutic abortions are to be considered as an item of family planning services for which Federal financial participation . . . is available . . . However, *Federal matching is available* . . . for abortions *when provided* under the State plan *as a physicians' services or otherwise.*" Proposed HEW rule 45 C. F. R. §249.10(b)(4)(iii), 339 Fed. Reg. 42919, 42920 (December 9, 1974) (emphasis supplied).

The foregoing evidences the federal Government's view that Title XIX *neither prohibits, nor requires* a Medicaid state's payment for non-therapeutic abortions, and that such states are free to either provide or deny at their option medical assistance for such an abortion.

It is undisputed that the Government has pursued a policy of sharing in a state's funding of non-therapeutic abortions, pursuant to its stated position.

The majority's disregard of the stated views of the federal agencies concerned with administration of Title XIX, contravenes the settled rule that construction of a statute by an agency charged with its administration should be accorded great deference, absent compelling indications that it is clearly wrong.[20]

This, too, must be said:

It cannot be gainsaid that Title XIX does not make any reference to abortions—therapeutic or elective—and that its legislative history is similarly silent on that score.

In recognition of that fact, the majority concededly reached its holding as to the force of Title XIX with respect to abortions—therapeutic and elective—by "interpreting"[21] Title XIX to support its conclusion. In doing so it said:

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[20] Lewis v. Martin, 397 U.S. 552, 559 (1970); Rosado v. Wyman, 397 U.S. 397, 415 (1970); Federal Housing Administration v. Darlington, Inc., 358 U.S. 84, 90 (1958); Bernstein v. Ribicoff, 299 F. 2d 248, 253 (3d Cir.), *cert. denied*, 369 U.S. 887 (1962).

[21] The concession is expressed in the majority's following statement:

> "*By interpreting Title XIX as we have*, we thus avoid an inquiry into the constitutionality of the Pennsylvania procedures. . ." (emphasis supplied).

"It is *impossible to believe* that in enacting Title XIX *Congress intended* to freeze the medical services available to recipients as those which were legal in 1965."

The quoted statement clearly falls into the category of argument criticised as a "departure from ordinary principles of statutory interpretation," in the recent case of *Burns v. Alcala*, 43 U.S.L.W. 4374 (decided March 18, 1975).[22]

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[22] In *Burns v. Alcala*, the Supreme Court was presented with the question: "whether States receiving federal financial aid under the program of Aid to Families with Dependent Children (AFDC) *must* offer welfare benefits to pregnant women for their unborn children." 43 U.S.L.W. at 4374-75 (emphasis supplied). Viewing the matter as "one of statutory interpretation," the Court held that the term "dependent children," as presently defined by the Social Security Act does not encompass "unborn children," and therefore a state is not required by the Act to include unborn children as those eligible for AFDC benefits, but may do so, in which event federal matching funds would be available. (The Court remanded the case, however, for consideration of the constitutional issues).

After reviewing the provisions of the Act governing AFDC eligibility, the Court stressed that its prior decisions in this area had not established "a special rule of [statutory] construction." *Id.* at 4375. Lower courts, in considering the same issue, were admonished for departing from the "ordinary principles of statutory interpretation" as evidenced by their holdings that "persons who are *arguably* included in the federal eligibility standard *must be* deemed eligible unless the Act or its legislative history clearly exhibits an intent to exclude them from coverage, in effect creating a presumption of coverage when the statute is ambiguous." *Id.* at 4376 (emphasis supplied).

In the instant case, the majority likewise departs from the "ordinary principles of statutory interpretation" by construing

The same is true with respect to this further conclusory statement of the majority:

> "We therefore conclude that *once* the state has decided to finance full-term delivery and therapeutic abortion as methods for the treatment of pregnancy, it *cannot decline to finance non-therapeutic abortions without violating the requirements of Title XIX.*" (emphasis supplied.)

It may be noted at this juncture that the stated construction of Title XIX is sharply at odds with that of the Solicitor General in his Amicus Curiae Memorandum.

In spelling out his views as to "the extent of the 'medical assistance' which must be provided" under Title XIX, the Solicitor General said:

> "Furthermore, a participating state *need not pay for every kind of medical treatment* encompassed within those five categories. The state is required only to set 'reasonable standards' . . . for determining . . . the extent of medical assistance . . . *consistent with the objectives* of [Title XIX]' 42 U.S.C. 1396a (a) (17)," and, "[w]e disagree" with the contention "that the denial of assistance with respect to non-medically indicated abortions is not 'reasonable' under 42 U.S.C. 1396a (a) (17)."

I agree with the Solicitor General's rejection of the contention that the denial of assistance with respect to non-medically indicated abortions is not reasonable under Title XIX.

Title XIX as *requiring* payment for non-therapeutic abortions inasmuch as such abortions are "arguably" a "necessary medical service" reimbursable under the Medicaid Program.

The Title's use of the phrase "amount, duration and scope of services" in its various provisions, indicates that "Congress anticipated that states would limit the types of services they covered . . ."[23]

In summary, I would for all the reasons stated in the foregoing discussion, affirm the holding of the court below that the *"Pennsylvania Regulations do not conflict with Title XIX of the Social Security Act."* (Emphasis supplied.)

II. THE CONSTITUTIONAL ISSUE

The court below held that the Pennsylvania Regulations "are unconstitutional because they are in violation of the Equal Protection Clause since they create an unlawful distinction between individual women who choose to carry their pregnancies to birth, and indigent women who choose to terminate their pregnancies by abortion."[24]

It premised its holding on these grounds:

"Under traditional Equal Protection standards, once the State chooses to pay for medical services rendered in connection with the pregnancies of some indigent women, it cannot refuse to pay for the medical services rendered in connection with the pregnancies of other indigent women electing abortion, unless the disparate treatment supports a legitimate State interest,"[25] and, "the State's

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[23] Butler, The Right to Abortion under Medicaid. 7 Clearinghouse Review 713, 718 (1974).

[24] 376 F. Supp. at 191.

[25] *Id.* at 186.

decision to limit coverage to 'medically indicated' abortions, as arbitrarily determined by it, is a limitation which promotes no valid State interest."[26]

I would reverse the unconstitutionality holding of the court below, albeit the Eighth and Tenth Circuits and four district courts[27] have held unconstitutional regulations and statutes similar to the Pennsylvania Regulations, and no court has held to the contrary.[28]

I agree with the dissenting view below that "there is no constitutional requirement that the State must finance exercise of a 'fundamental' right, nor does a classification which distinguishes between medically necessary

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[26] *Id.* at 191.

[27] *See* Wulff v. Singleton, 508 F. 2d 1211 (8th Cir. 1974), cert. granted, 43 U.S.L.W. 3670 (June 24, 1975); Doe v. Rose, 499 F. 2d 1112 (10th Cir. 1974); Doe v. Myatt Civ. No. A3-74-48 (D. N.D. Jan. 27, 1975); Doe v. Westby, 383 F. Supp. 1143 (D. S.D. 1974), *vacated and remanded* for consideration of the statutory grounds, 43 U.S.L.W. 3499 (March 17, 1975); Doe v. Rampton, 366 F. Supp. 189 (D. Utah 1973); Klein v. Nassau County Medical Center, 347 F. Supp. 496 (E.D. N.Y. 1972), vacated and remanded for further consideration in light of Roe v. Wade and Doe v. Bolton, 412 U.S. 925-26 (1973).

[28] The Sixth Circuit, however, remanded for consideration by a three-judge court the issue of constitutionality of an Ohio statute and administrative policy similar to the Pennsylvania Regulations after expressing its "disagreement with the Eighth Circuit's ruling in Wulff v. Singleton, 508 F. 2d 122 (8th Cir. 1974), that the unconstitutionality of this type of statute is so 'obvious and patent' as to obviate the need for a three-judge court." Roe v. Ferguson, 43 U.S.L.W. 2452 (April 28, 1975).

and non-necessary abortions offend the Equal Protection Clause."[29]

The sum of the holding of the court below is that since Pennsylvania's Medicaid program pays for medical services incident to full-term delivery, and/or therapeutic abortions, it violates the Equal Protection Clause when it denies payment for an elective abortion.

The holding reflects the court's subscription to the plaintiffs' contention that an elective abortion is one way of handling a pregnancy and accordingly such an abortion falls within the category of "necessary medical care" extended by Pennsylvania to pregnant eligibles. It also reflects rejection of Pennsylvania's contentions that its Medicaid program provides only for extension of "necessary medical care," and its payment for a full-term delivery and/or therapeutic abortion properly fall within the range of reasonably-defined "necessary medical care" for the condition of pregnancy, and that a non-therapeutic (elective) abortion does not do so.

Discussion of the constitutional issue must be prefaced by these observations with respect to the present state of the law as indicated by Supreme Court decisions:

A woman has a constitutional right to terminate her pregnancy during its first two trimesters. *Roe v. Wade,* 410 U.S. 113 (1973); *Doe v. Bolton,* 410 U.S. 179 (1973).

The Supreme Court did not hold in these cases that a state is under a duty to finance the exercise of the constitutional right to an elective abortion, nor has it ever held that *medical care in general* is a fundamental right,

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[29] *Id.* 376 F. Supp. at 193.

albeit it has recognized that "medical care is . . . 'a basic necessity of life' to an indigent . . ."[30]

The Supreme Court has declined to designate welfare in general as a fundamental right,[31] although it has recognized the critical importance of welfare as providing "the very means by which to live."[32]

The cornerstone of the plaintiffs' contention is that the Regulations, *in the absence of a compelling state interest,* violate the Equal Protection Clause in that they discriminatorily divide pregnant eligibles *into two classes*—one which chooses to carry pregnancy to full term delivery, and another which elects to terminate pregnancy for non-therapeutic reasons.

The fallacy of the stated contention is that it disregards the fact that Pennsylvania in its medicaid program has committed itself to extend medical care to its eligibles only where *"necessary medical care" is required.* The only classification made by the Regulations is between necessary medical care and non-necessary medical care. Such a classification does not call into play the "compelling state interest" test. It is subject only to the "reasonable basis", otherwise stated, "rational basis" test, spelled out in *Dandridge v. Williams,* 397 U.S. 471 (1970). There, the Court held that a state regulation which reduced family welfare benefits did not violate the Equal Protection Clause. In doing so it said in relevant part at page 485:

[30] Memorial Hospital v. Maricopa Hospital, 415 U.S. 250, 259 (1974).

[31] *See, e.g.* Jefferson v. Hackney, 406 U.S. 535 (1972).

[32] Goldberg v. Kelly, 397 U.S. 254, 264 (1970).

> "In the area of economics and *social welfare,* a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. *If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification* 'is not made with mathematical nicety or because in practice it *results* in *some inequality.' Lindsley v. Natural Carbonic Gas Co.,* 220 U.S. 61, 78. 'The problems of government are practical ones and may justify, if they do not require, rough accomodations—illogical, it may be, and unscientific.' *Metropolis Theater Co. v. City of Chicago,* 228 U.S. 61, 69-70." (emphasis supplied).

I am of the opinion that the classification between "necessary medical care" and "non-necessary medical care" survives the application of the "reasonable basis" and/or "rational basis" tests.

It cannot be gainsaid that full-term delivery and/or therapeutic abortions reasonably and rationally fall within the category of "necessary medical care" for a pregnant woman, and that an "elective" or non-therapeutic abortion does not do so.

This, too, must be said:

The holdings of unconstitutionality in the Eighth and Tenth Circuit cases, cited in note 27, rested in large part on the analysis of the three-judge district court in *Klein v. Nassau County Medical Center*[33] in holding that providing

[33] *See* note 27, *supra.* The *Klein* court said:

> "The directive, and the State statute, if interpreted as mandating the Commissioner's directive, would deny indigent women the equal protection of the laws to which they are con-

financial assistance to pregnant mothers who carry their babies to full term and delivery while denying financial assistance to mothers who choose instead an "elective" abortion denied the latter mothers the equal protection of the laws guaranteed by the Fourteenth Amendment. That analysis, in only slightly different terms is also advanced before this court by the plaintiffs. The persuasiveness of the analysis depends upon a willingness to accept the posture of the mother as one in which she is required to "resign her freedom of choice" not to bear the fetus term.

There is both a verbal and an emotional appeal about this argument. But the legal and economic fact as well is not precisely stated in it. The compulsion to "resign her freedom of choice" derives not from the state policy but

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stitutionally entitled. ***They alone are subjected to State coercion to bear children which they do not wish to bear,*** and no other women similarly situated are so coerced. ***Other women,*** able to afford the medical cost of either a justifiable abortional act or full term child birth, ***have complete freedom to make the choice*** in the light of the manifold of considerations directly relevant to the problem uninhibited by any State action. ***The indigent is advised by the State that the State will deny her medical assistance unless she resigns her freedom of choice and bears the child.*** She is denied the medical assistance unless she resigns her freedom of choice and bears the child. She is denied the medical assistance that is in general her statutory entitlement, and that is otherwise extended to her even with respect to her pregnancy. ***She is thus discriminated against both by reason of her poverty and by reason of her behavioral choice. . . .***" 347 F. Supp. at 500. (emphasis supplied.)

It must be noted that the three other district court cases cited in note 27 have also rested their holdings on the reasoning of *Klein*.

from the mother's poverty. The equal protection clause as sought to be used here would require this court to determine that the state, having undertaken to relieve *some* of the burdens of poverty is required to remedy *all* of poverty's burdens. The state, with some support from the medical profession, in reaching a determination of what is medically necessary, and unquestionably with support based on the prevailing mores of the majority of our society, has decided to remedy that problem of poverty which is represented by the costs of medical care during pregnancy and the delivery of the baby. From society's point of view, there are a variety of arguments for the wisdom of such public expenditure, most based upon the desirability of preserving the life and well being of the expectant mother and of assuring healthy babies. The state, thus far, has not concluded that avoidance of unwanted babies is as important as avoidance of unhealthy babies. This may well be an improper determination of values. A court may regard the two objectives as of equal magnitude and conclude that the state is quite wrong. It would be an error, however, for courts to displace the value judgment of the legislature with the value judgment of the court absent a finding that the value judgment of the legislature is proscribed by the Constitution.

There are probably no programs of the state or federal government affording financial assistance that do not contain within them, sometimes unarticulated, norms of conduct that are prerequisite to receiving the assistance. Surely the unavailability of unemployment compensation to one who quits his or her job while affording it to one who has labored to retain it but has been laid off serves as an inducement to refrain from quitting. For the well-off

person in our society, with some independent reserves, that inducement is irrelevant, and the individual is free to quit. For the low-income employee, that policy may well prevent the person from refusing to continue in employment that has become, perhaps, personally unbearable.

The examples could be multiplied. In their determinations of appropriate contexts of financial aid the federal and state legislatures have reflected societal prejudices about human conduct. These differentially affect the poor, who are dependent upon governmental assistance, and the more affluent, who are not. To require the states to forego this kind of policymaking would be to require the states to choose between leaving the pain of poverty unabated or to provide assistance neutral in its assertion of values. Not only would this seem to go well beyond present decisions of the Supreme Court of the United States in interpreting the equal protection clause but it would, if embraced, likely place financial assistance to the poor in many contexts beyond what is politically feasible, thus leaving all the poor worse off than under the present value distinctions made.

Only in the areas in which the poor are faced with governmentally imposed financial burdens—divorce court fees, appeal transcript fees—has the Supreme Court found that legislatures are constitutionally bound to relieve the poor of the burdens of their poverty. The instant case might be such a case, for example, if the Pennsylvania legislature had established a minimum doctor's charge, or even more clearly, a state license fee for an elective abortion. But in the instant case, the burden carried by the indigent mother who desires, an elective abortion has not been made greater by the state. It has simply not been

eased, whereas the state has eased the burden of the costs of pregnancy for the mother who wishes to carry the fetus until term. That kind of distinction in affordance of financial assistance has not till now and should not be subject to judicial supervision under the aegis of the Fourteenth Amendment.

The Equal Protection Clause does not provide cure-all panaceas, or Utopian solution, with respect to all the problems incident to the condition of poverty, e.g. inability of an indigent pregnant woman to privately finance her non-medically necessary (elective) abortion. Otherwise stated, the Equal Protection Clause cannot be construed to afford a guarantee against *all* the incidents of the condition of poverty.

III. THE DISCRIMINATORY ADMINISTRATION OF THE REGULATIONS

As earlier stated, I would enjoin enforcement of the Regulations on the ground that they are being administered in violation of the Equal Protection Clause in that *they are not enforced* against indigents who threaten suit when they are denied funding of an elective abortion. and *they are enforced* against those who do not threaten suit.

It has long been settled that State administrative procedures which are *per se* valid and constitutional may, nevertheless, be enjoined when they are unconstitutionally applied. *Yick Wo v. Hopkins,* 118 U.S. 356 (1886). More recently, the Supreme Court has stressed that "a law non-discriminatory on its face may be grossly discrimina-

tory in its operation". *Williams v. Illinois*, 399 U.S. 235, 242 (1970); *Griffin v. Illinois*, 351 U.S. 12 at page 17, n.11 (1956).

The Pennsylvania Department of Justice concedes[34] that "it entered into a policy of consenting to the granting of the requested relief [funding of an elective abortion] on an individual basis when . . . litigation was threatened", and it cites in corroboration a Stipulation detailing its policy filed in another action.

In making that concession, the Justice Department urges that "[t]his was *not* a policy of the Pennsylvania Department of Welfare in any way modifying the uniform application of the Pennsylvania Medicaid Regulations. This was, and still is, merely a policy of the lawyers for the defendant in pending litigation . . .".

The fact that Pennsylvania pays for an elective abortion when suit is threatened or pending establishes discriminatory administration of its Regulations. It *is utterly irrelevant* that payment for an elective abortion is made *at the instance of "the lawyers for the defendant"* and *not by way "of the policy of the Department of the Pennsylvania Department of Welfare."*

"The play's the thing."*

The sum total of the existing situation with respect to the Regulations is that they are enforced as to some pregnant indigents seeking elective abortions and denied as to others in the same category.

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[34] Petition for Reargument of the Pennsylvania Department of Justice.

* Shakespeare, *Hamlet*, II, c.1601.

Standing alone, and independently so, the stated circumstances constitute violation of the Equal Protection Clause of the Fourteenth Amendment.

I would for this reason remand the cause to the court below with directions to enjoin enforcement of the Pennsylvania Regulations in light of their Administration in violation of the Equal Protection Clause of the Fourteenth Amendment.

Judge Gibbons joins in this dissenting opinion except as to Part III.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 74-1726 and 74-1727

Ann Doe; Betty Doe, a minor, by her mother as representative, Mother B. Doe; [Cathy Doe; Donna Doe,] a minor, by her mother as representative, Mother D. Doe; Elaine Doe; Jane Doe, a minor by her father as representative, Father J. Doe; Nancy Doe; Patricia Doe; Ruth Doe; Sylvia Doe; and Toni Doe, each individually and on behalf of all other women similarly situated,

Appellants in No. 74-1727

v.

Frank S. Beal, individually and as Secretary of the Department of Public Welfare, Commonwealth of Pennsylvania; Roger Cutt, individually and as Assistant Deputy Secretary for Medical Services, Commonwealth of Pennsylvania; Glenn Johnson, individually and as Chief of the Bureau of Medical Assistance, Commonwealth of Pennsylvania; James A. Dorsey, Jr., individually and as Executive Director of the Allegheny County Board of Assistance; and the Department of Public Welfare, of the Commonwealth of Pennsylvania,

Appellants in No. 74-1726

(D.C. Civil No. 73-846)

Appeal From the United States District Court
for the Western District of Pennsylvania

Present: Seitz, *Chief Judge* and Kalodner, Van Dusen, Aldisert, Adams, Gibbons, Rosenn, Hunter and Garth, *Circuit Judges*

JUDGMENT ON REHEARING

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued and later reargued en banc by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court filed May 28, 1974, be, and the same is hereby modified to read as follows:

> ". . . IT IS HEREBY ADJUDGED AND DECREED that the Regulations and Procedures of the Department of Public Welfare of the Commonwealth of Pennsylvania, as they apply to reimbursement for abortions performed within the first two trimesters of pregnancy, are invalid because they are inconsistent with Title XIX of the Social Security Act, 42 U.S.C. §1396, *et seq.* In all other respects, Plaintiffs' Request for Declaratory Judgment are denied."

The cause is hereby remanded to the said District Court so that the three-judge court can be dissolved and the assigned district judge can take any further action required, consistent with the opinion of this Court. Costs taxed against defendant-appellants at No. 74-1726.

ATTEST:

THOMAS P. QUINN
Clerk

July 21, 1975

ADAMS, *Circuit Judge,* dissenting:

I respectfully dissent from the majority. In my judgment, the Pennsylvania regulations are not incompatible with the scheme of medical aid to indigents envisaged by Congress in Title XIX of the Social Security Act. In addition, I do not believe that the Pennsylvania schedule for reimbursements, that includes only medically indicated abortions, violates the Constitution.[1]

These conclusions are grounded on reasons set forth in the dissenting opinion of Judge Kalodner here, and that of Judge Weis in the district court, and are based also on the various authorities referred to in those opinions.

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[1] It would appear, however, that the Pennsylvania regulation may not be enforced insofar as it predicates eligibility for medical assistance payments on conditions that were specifically invalidated in Doe v. Bolton, 410 U.S. 179 (1973), namely, a concurrence of two doctors and performance of the procedure in an accredited hospital.